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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1988 to December 31, 1988

VOLUME 3

PAGES 1693-2535

Saul Cooperman
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1019-88
AGENCY DKT. NO. 2-1/88

CEREBRAL PALSY SCHOOL AND TREATMENT CENTER OF CAMDEN COUNTY, INC.,
Petitioner,
v.
THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

John L. Conroy, Jr., Esq., for petitioner (Brown and Connery, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: April 27, 1988 Decided: June 10, 1988

BEFORE **DANIEL B. MC KEOWN, ALJ:**

Cerebral Palsy School and Treatment Center of Camden County, Inc. (petitioner) is a private school which educates handicapped pupils. Their financial records are examined yearly by the New Jersey Department of Education, Division of Finance. Petitioner challenges a finding made by the Division of Finance following the 1986-1987 examination that petitioner rents the school facility from Cordamore, Inc. who shares with petitioner the same board of directors. As the result of that finding, the Division of

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Finance applied N.J.A.C. 6:20-4.4(a)37 which limits rental cost to the cost of ownership plus a 2.5 percent return. Petitioner argues that the regulation itself is arbitrary, capricious and unreasonable and, therefore, must be set aside. Respondent State of New Jersey, Department of Education, Division of Finance moved to dismiss the petition for failure to state a cause of action or, alternatively, respondent seeks summary decision on the merits of the case. After the motion was filed, the Commissioner then transferred the matter on February 17, 1988, to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. The Newark office of the Office of Administrative Law scheduled a telephone prehearing conference for April 26, 1988. In the meantime, petitioner filed a letter memorandum in opposition to respondent's motion to dismiss and for summary decision. During the prehearing conference conducted April 26, it was agreed that the conference be continued pending a ruling on respondent's motion.

For the reasons which follow, respondent's motion to dismiss for failure to state a cause of action is granted and summary decision is granted respondent State of New Jersey, Department of Education, Division of Finance on the merits.

BACKGROUND FACTS

The background facts of the matter for purposes of the disposition of the motions are as follows and as determined by the pleadings and the respective statement of facts filed by the parties. Petitioner Cerebral Palsy School and Treatment Center of Camden County, Inc., is a New Jersey non-profit corporation which operates a private school for handicapped pupils. Cordamore, Inc., is a New Jersey non-profit corporation which owns a building which it leases to petitioner for educational purposes. Local public boards of education refer pupils to petitioner's facility in order to provide those pupils with an appropriate education. Tuition rates which petitioner may charge sending local public boards of education are calculated in accordance with the administrative rules set forth at N.J.A.C. 6:20-4.1. Such tuition rates are calculated following an examination of the private school's financial records by the Division of Finance. The Division arrives at a per-pupil audited tuition rate based upon actual allowable costs for a particular year.

During the 1986-87 examination by the Division of petitioner's financial records the Division found the petitioner's board of directors and the board of trustees of Cordamore, Inc., to be as follows:

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CEREBRAL PALSY SCHOOL AND TREATMENT CENTER	CORDAMORE, INC.
Alfred Minicozzi	Alfred Minicozzi
Stanley Chojnacki	Stanley Chojnacki
Nicholas Settanni	Nicholas Settanni
Herman Keubler	Herman Keubler
Walter Wells	Walter Wells
Harry Klein	Harry Klein
Douglas Lehnowsky	Frank Scola

The Division auditors in its formal report following its examination of petitioner's financial records for 1986-87 found as follows:

> The Cerebral Palsy School and Treatment Center of Camden County, Inc. rents the school facility from Cordamore, Inc. and both corporations share the same board of directors. This was not disclosed on page B-5 of the 1986-87 Application For Approval of a Tuition Rate. Due to the common board of directors, the rental agreement between the Cerebral Palsy School and Treatment Center of Camden Inc. and Cordamore, Inc. is considered a related party transaction. Therefore, according to N.J.A.C. 6:20-4.4(a)37 the cost of the rental is limited to the cost of ownership incurred by the related party (Cordamore, Inc.) plus a 2.5 percent return on the cost of ownership. Rental costs in excess of the cost of ownership and the 2.5 return on the cost of ownership are considered non-allowable costs and must not be included in the calculation of the per pupil audited tuition rate.

On or about January 4, 1988 petitioner filed a petition of appeal before the Commissioner of Education challenging the 2.5 percent return limitation on the cost of ownership. The petition identifies petitioner as a New Jersey non-profit corporation; that its financial records were examined for 1986-87 by the Division of Finance; that the Division of Finance issued a fiscal monitoring report; that the report included the finding that both petitioner and Cordamore, Inc., share the same board of directors and that the rental agreement between both corporations is a related party transaction; that because

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of the related party transaction the cost of rental was limited to 2.5 percent and that rental costs in excess were considered nonallowable for purposes of per-pupil audited tuition rates; that petitioner did not agree with the "above finding" and responded to the report by letter from counsel on July 27, 1987; that the Assistant Commissioner in charge of the Division of Finance responded on October 2, 1987 to counsel's letter; and, that petitioner wishes to appeal "the above finding and the application of N.J.A.C. 6:20-4.4(a)37***."

Counsel's referenced letter of July 27, 1987, advised that the Cerebral Palsy School and Treatment Center of Camden County, Inc., does not agree that it and Cordamore, Inc. are related parties for purposes of the cited rule, that both entities were incorporated separately prior to 1978, that each functions independent of the other, and each serves disparate purposes. Counsel then proceeds to point out that the language of one rule regarding rental costs for buildings owned by a parent organization not separately incorporated conflicts with another rule which focuses on transactions between related parties where one party is able to control the actions of the other. Counsel claims that the 2.5 percent limitation on return is an artificial constraint which ignores the multiple factors involved in real estate investment.

The Assistant Commissioner in charge of the Division of Finance advised counsel by letter dated October 2, 1987 that a related party relationship exists between Cerebral Palsy School and Treatment Center of Camden County, Inc. and Cordamore, Inc. and, as such, the 2.5 percent return on the actual cost of ownership limitation must be applied.

This concludes a recitation of the background facts of the matter necessary for the pending motion.

ARGUMENTS

Respondent in its motion to dismiss notes that a petition of appeal must contain a statement of the facts upon which a claim for relief is based which would show or tend to show entitlement to relief. In this case respondent claims that while petitioner explains why it filed the petition, there is an absence of allegations specifically directed against respondent. Respondent points out that petitioner does not dispute findings that it is a related party with Cordamore nor does it explain why, in light of that acquiescence, it

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is entitled to relief. Therefore, respondent claims petitioner has failed to set forth a meritorious claim against the State of New Jersey, Department of Education, Division of Finance upon which any relief should or could be granted.

Alternatively respondent contends there are no disputes as to the material facts of the matter and, consequently, it is entitled to summary decision as a matter of law.

Petitioner in opposition to the motion contends that the regulation the Division of Finance relies upon is arbitrary, capricious, and unreasonable and points out that better approaches are available for the State to achieve its goal of regulating the legitimate interests it has of tuition charged public school boards of education by private schools.

CONCLUSIONS

N.J.A.C. 6:24-1.3 sets forth the rules for filing a petition of appeal before the Commissioner. The rule provides in part as follows:

> (a) The petition must include the name and address of each petitioner, the name and address of or a description sufficient to identify each party respondent, and a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws, and must be verified by oath. The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen and should be presented in substantially the following form***

In this matter, there are no specific allegations or essential facts pleaded by petitioner which give rise to a dispute under the school laws other than petitioner's disagreement with the validity of the rules promulgated by the State Board of Education regarding tuition for private schools for the handicapped at N.J.A.C. 6:20-4.1 et seq. These rules, most recently amended May 4, 1987, (see 19 N.J.R. 751) were publicly proposed (19 N.J.R. 336), and commented upon by the public prior to their adoption by the State Board of Education. While the petition may be seen to dispute the finding that

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Cerebral Palsy School and Cordamore are not related parties for purposes of the rule, N.J.A.C. 6:20-4.4(a)(39), there are no facts pleaded to show the basis for such an inferential allegation. In fact, there are no facts pleaded upon which petitioner may be seen to be entitled to relief under school laws. For this reason, the petition of appeal is, I **FIND**, insufficient to the extent that the petition must be **DISMISSED.**

Accordingly, respondent's motion to dismiss for failure of the petition to state a cause of action is hereby granted. The petition of appeal is **DISMISSED.**

Alternatively, summary decision must be granted respondent on the merits of the case even if the petition of appeal is not dismissed. In 1986 when the State Board of Education announced proposed rule amendments regarding tuition for private schools for the handicapped at 18 N.J.R. 1237, the accompanying summary of the proposed noted that as of July 1, 1985, 21 private schools for the handicapped had set up commonly owned or controlled corporations. The private schools either transferred title to fixed assets used by the private schools for the handicapped to the related corporations or had the related corporations purchase fixed assets to be used by the private school for the handicapped. The related corporations then collected rentals from the private schools for use of the fixed assets. It was noted that such rentals can exceed the cost of ownership that would be allowable had title to the fixed assets vested in the private school. That way, the related corporation would be allowed to sell the fixed asset without reimbursing the program for tuition funds expended for such fixed assets. Such transactions between related parties, it was noted, are entered at less-than-arm's length.

The summary went on to note that it appeared the only purpose of such corporations is to rent buildings and equipment to the related private school for the handicapped which, in turn, gives the corporations the appearance of being straw corporations designed solely to disguise activities otherwise nonallowable for purposes of tuition. The result of such a corporation was to divert funds intended for the education of handicapped pupils for other uses.

N.J.A.C. 6:20-4.4 sets forth nonallowable costs for purposes of the establishment of tuition rates which may be charged a public board of education by a private school for purposes of the handicapped. The rule at paragraphs 38-39 provides in part as follows:

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38. Rental costs for buildings and equipment (are not allowable) when owned by a parent organization not separately incorporated;

39. Certain costs related to transactions between related parties in which one party to the transaction is able to control or substantially influence the actions of the other. Such transactions are defined by the relationship of the parties and include, but are not limited to, those between divisions of an institution; institutions or organizations under common control through common officers, directors, or members***

In this case, the Board of Directors of the Cerebral Palsy School are identical with the Board of Trustees for Cordamore, Inc., with the exception of Douglas Lehnowsky and Frank Scola. These two exceptions do not destroy the clear common control through common officers of both corporations and, despite the fact that both corporations may have been separately incorporated prior to 1978, the fact remains that they presently are controlled jointly through common officers. Accordingly, the rule, particularly at paragraph 39, was intended to place the 2.5 percent limitation in these kinds of situations.

Accordingly, there are no material facts in dispute with respect to the background of this matter. Summary decision must be granted the State of New Jersey, Department of Education, Division of Finance that the rules regarding the tuition for private schools for the handicapped apply in this situation. Petitioner's challenge to the constitutionality of the regulation as promulgated by the State Board of Education, together with the allegation that the rule is arbitrary, capricious or unreasonable on its face is a challenge that must be heard in a forum other than an administrative tribunal. See R.2:2-3.

For the foregoing reasons, the petition of appeal is **DISMISSED** as having failed to state a cause of action and, alternatively, summary decision is granted respondent State of New Jersey, Department of Education, Division of Finance that its actions in this matter are proper and correct.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 10, 1988
DATE

Daniel B. McKeown by MKD
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

- 10 - 88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

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DATE

OFFICE OF ADMINISTRATIVE LAW

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CEREBRAL PALSY SCHOOL AND TREATMENT CENTER OF CAMDEN COUNTY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMEMT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner finds that there is nothing which warrants a reversal of the ALJ's findings and conclusions set forth in the initial decision. The Commissioner hereby adopts those findings as his own.

Accordingly, Summary Judgment is granted in respondent's favor and the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 19, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3117-88
AGENCY DKT. NO. 104-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY.

Jacqueline Lee Simmons, petitioner, pro se

Record Closed: May 26, 1988 Decided: June 8, 1988

BEFORE **BRUCE R. CAMPBELL, ALJ:**

Pursuant to a letter complaint filed by candidate Jacqueline Lee Simmons in accordance with N.J.S.A. 18A:14-63.12, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 5, 1988, in the Holland Township, Hunterdon County, School District.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. An inquiry was conducted by the undersigned on May 26, 1988. Four witnesses were heard and three documents were admitted into evidence.

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The announced results of the balloting for the election of school board members in the Holland district were as follows:

FOR 3-YEAR TERMS
(3 SEATS TO BE FILLED)

F. Richard Grogan	351
Donald McAghon	306
Carl J. LoGuidice	288
Jackie Simmons	287
Robert A. Marzullo	282 (C-1).

Candidates Grogan, McAghon and LoGuidice were declared winners in a recount conducted by a representative of the Commissioner of Education on April 18, 1988, at the Holland Township Municipal Building. The representative's findings were the same as the original results reported.

Jacqueline Simmons, petitioner, testified that she was told by the Board secretary that a person not registered to vote filed an affidavit during the election of April 5 and cast a ballot in that election. Two or three days later, Simmons wrote a letter to the Commissioner of Education. She requested a recount of the votes and an inquiry. She enclosed a $2.00 certified check to cover the expense of recount for the one machine used in the district, N.J.S.A. 18A:14-63.2; N.J.S.A. 18A:14-63.6. The Commissioner instituted the inquiry under authority of N.J.S.A. 18A:14-63.12.

The Board secretary testified that she opened the polls on April 5, 1988 and, after receiving results from election workers, closed the polls. She called the Director of the County Board of Elections and learned the number of absentee ballots cast for each candidate and that one person had voted by affidavit.

The election worker who handled the affidavit incident did so according to instructions of the Office of the County Superintendent of Schools transmitted by means of a manual and a training session. The Board secretary later learned through discussion with the director of the election board that the instructions from the county office were contrary to the procedures followed in general elections. In a general election, if a poll worker calls the Board of Elections in the presence of the potential voter and the election board representative says there is no record of registration and no signature copy for that voter in the signature copy book, the person is not allowed to vote.

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The person denied may appeal on an expedited basis before a judge of the Superior Court. At least one judge in each county is on call during each general election.

The Board secretary understood the instructions from the county office to state that in a school election a person may sign an affidavit and vote under similar circumstances. During her conversation with the elections office, a representative told her that the school election workers should determine among themselves if the person should be allowed to vote. The Board secretary emphasized that she believes this question needs clarification and whatever is done should be done uniformly.

An election worker testified that shortly before 4 p.m. on April 5, 1988, a voter presented himself at polls. A worker covering the regional school district election could not find the voter's name in the signature register and neither could she. The voter insisted he was registered. He did not claim to have changed address.

The witness called the County Board of Elections. A person there informed her that the voter was not registered. He also stated this to the voter. The election worker, based on instructions she had received in a training session, offered the voter an affidavit. He read and signed the affidavit, voted in the Holland Township election and voted in the regional district election.

The witness believed the voter believed he was registered. When a candidate later questioned her, she explained what had happened. The witness also stated she has been upset since the incident and agrees with the Board secretary that if the practice is not allowed in other elections, it should not be used in school elections.

The supervisor of the office of the Hunterdon County Board of Elections testified. On the day following the school elections he was informed that one Alfred DeBeau, Jr., had appeared to vote in Holland Township. The election worker called the elections board office. The elections board representative stated that Mr. DeBeau was not a registered voter.

On the following day, this witness looked up the record and determined that Mr. DeBeau had registered in 1981. The rule is that a person must vote at least once in four

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years to maintain active registration. DeBeau had last voted in the 1983 general election. Therefore, he was not registered on April 5, 1988.

The witness also stated that he and the county school business administrator had not agreed on the proper use of affidavits in school elections. However, school officials run school elections, not he. The witness examined exhibit C-3, the affidavit form in question. He stated it is similar to the form that his office uses. He believes it should be used if the voter is challenged; for example, if a person has moved within the county, and wishes to vote in a new district, this form would be appropriate. His office would not advise its use in a school election.

N.J.S.A. 18A:14-52 provides:

> In any school election, if the duplicate permanent registration form of any person cannot be found in the signature copy register at the time he applies for a ballot and such person claims that he was permanently registered in such municipality at least 40 days prior to such election or that he was permanently registered in another municipality within the same county and filed or forwarded a change of residence notice to the commissioner of registration of the county or the clerk of the municipality, if the municipality is not the one in which the county seat is located, certifying that he has moved to the municipality in which he seeks to vote at least 40 days prior to such election, one of the school election officers shall require such person to make and sign an affidavit, which may be taken by any school election officer, in the form which shall have been prescribed by the commissioner of education, which form shall include a statement that such person was permanently registered at least 40 days prior to such election in such municipality or in another municipality within the same county and filed or forwarded a change of residence notice to the commissioner of registration of the county or the clerk of the municipality, other than the municipal clerk of the municipality in which the county seat is located, certifying that he has moved to the municipality in which he seeks to vote at least 40 days prior to such election, and that such person has the qualification required to vote at such election. If such form has been properly filled out by a school election officer and signed by such person, such person shall be eligible to receive a ballot. The number of the ballot shall be recorded on such form and the form shall be transmitted to the superintendent of schools of the county, in the sealed packet required by this title.

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I **FIND** that one of the ballots cast in the election held in Holland Township on April 5, 1988, was illegal. It is necessary to determine the maximum effect that the voiding of this ballot could have upon the previously recorded votes for the candidates. The greatest possible effect is shown by deducting from each candidate one vote and comparing the remainder to the previously announced votes of any other candidate assuming that other candidate might not have received the voided vote.

When this is done, it is apparent that Carl J. LoGuidice and Jackie Simmons could be tied or the announced results could be reversed. I **FIND** it impossible to determine which of these candidates was elected.

Accordingly, I **DETERMINE** that pursuant to N.J.S.A. 18A:12-15(d), there shall be a special election restricted to Mr. LoGuidice and Ms. Simmons conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes.

The precise direction of the Legislature is:

> 18A:12-15. Vacancies
>
> Vacancies in the membership of the Board shall be filled as follows:
>
> . . .
>
> d. By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special elections shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election and shall be conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes;
>
> . . . .

Obviously, more than two persons were involved in the April 5 election and more than 60 days has passed since that election. On the first issue, the Appellate Division said in In the Matter of the Annual School Board Election Held in the School District of the Township of Wayne, 1974 S.L.D. 1078 (N.J. App. Div., Dec. 23, 1974) (unreported), that only those persons whose election could have been affected by the illegal ballot should be involved in the remedy. On the second issue, where a public body cannot act within the

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time provided by law, it must act as soon thereafer as reasonably may be done. Orlando v. Bd. of School Estimate of Voc.-Tech. Schools, Mercer Cty., OAL DKT. EDU 4450-83 (July 23, 1984), adopted Comm'r. of Ed. (Sept. 6, 1984).

It is **ORDERED** that the special election take place on the date directed by the Commissioner of Education in the final decision in this matter. If a final decision does not issue and this Initial Decision becomes final by operation of law, the special election shall be conducted on August 2, 1988.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 3117-88

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

8 JUNE 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6-9-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 13 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF HOLLAND	:	DECISION
TOWNSHIP, HUNTERDON COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Following receipt of the initial decision and record in this matter, the Commissioner received the following correspondence from Petitioner Jacqueline Lee Simmons, which the Commissioner hereby incorporates into the record:

> Dear Dr. Cooperman:
>
> In regard to the Annual School Election of Holland Twp., the judge has ordered in an initial decision that a special election take place.
>
> I choose not to run against Carl LoGuidice, and want to withdraw my name from the ballot. I feel Carl is a welcome addition to Holland's board and I wish him well.
>
> I had hoped, by the inquiry, that the use of affidavits, not only in this election, but in future elections, could be clarified.
>
> Sincerely,
>
> Jackie Simmons

Based on this letter, the Commissioner concludes that the instant matter has become moot as a result of petitioner's

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withdrawal of her candidacy for the annual school election held in Holland Township on April 5, 1988. Under such circumstances no further action is this matter is required nor will be taken. However, the Commissioner's review of the record in this matter comports with the ALJ's that, in fact, the affidavit voter procedure used by the Board at the election held on April 5, 1988 was in violation of N.J.S.A. 18A:14-52, thus rendering one ballot cast in said election invalid. The Board is herein admonished to conform strictly in future with all laws pertaining to elections. By virtue of Ms. Simmons withdrawing her candidacy, however, the Petition of Appeal herein is dismissed with prejudice.

COMMISSIONER OF EDUCATION

JULY 19, 1988

DATE OF MAILING - JULY 19, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2695-88
AGENCY DKT. NO. 81-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE WATCHUNG HILLS REGIONAL SCHOOL DISTRICT.

Christopher M. Doherty, Esq., for Clara J. Strupp (James O. DeLancey, attorney)

William S. Jeremiah II, Esq., for Watchung Hills Regional School District Board of Education (Buttermore, Mullen, Jeremiah and Phillips, attorneys)

Victor E.D. King, Esq., for Patrick J. Lott (King, King and Goldsack, attorneys)

Record Closed: May 5, 1988 Decided: June 13, 1988

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Pursuant to a letter complaint filed by candidate Clara J. Strupp in accordance with N.J.S.A. 18A:14-63.12, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 5, 1988, in the Watchung Hills Regional School District.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. An inquiry was conducted by the undersigned on April 27 and May 5, 1988, at the North Plainfield Municipal Court.

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The proceeding on April 27 was given over to preliminary matters. No testimony was taken. On May 5, seven witnesses were heard and eight documents admitted in evidence.

It was stipulated that candidate Patrick Lott's residence is not in question, the form and substance of nominating petitions are not in question and there is no issue concerning distribution of campaign literature. The issues are limited by agreement of all parties to alleged use by Lott of pupil lists, alleged campaigning by Lott on school time and misrepresentations allegedly made by Lott.

FACTS

From the parol and documentary evidence, I FIND the following to be facts in this matter.

Patrick Lott was employed by the Watchung Hills Regional School District Board of Education (Board) as a substitute teacher from approximately four years ago until April 5, 1988. He announced his candidacy for a Board seat in early 1988. He helped register at least four eighteeen-year old pupils to vote by witnessing their registration application. Three of these applications were completed outside of school and one was completed between classes.

Lott did not wear campaign buttons or electioneer while serving as a substitute teacher in the Board's schools. Lott did ask the support of some pupils he knew through school and school-related activities.

Lott did secure and begin to photocopy lists of high school alumni. A physics teacher observed Lott making the photocopies. He advised Lott that it was not a good idea, being a candidate, to photocopy pupil lists and take them out of the building. Lott agreed, picked up the list and left. The teacher who had observed Lott reported this incident to candidate Strupp approximately one week later. The teacher advised no administrator. Strupp, however, advised the Board and the administration. Board secretary contacted the principal of the high school and advised the principal of the allegation. The principal checked into the matter and reported to the secretary that there was no evidence of impropriety. The Board secretary wrote a letter to Lott (P-5) reminding him to "scrupulously avoid any actions that might be interpreted as

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campaigning during the time that you are employed." The Board secretary also requested "that you refrain from utilizing any lists of the names and addresses of Watchung Hills students which are not generally available to the public and, if any such lists have been given to you, that you return them immediately to the high school principal."

Lott's credible testimony is that he stopped copying the lists when approached by a teacher, checked with administration to see if it were permissable to use the lists, got approval, but did not have enough time to use the lists for campaign purposes because the names were not segragated by municipalities. Lott acknowledged receipt of the letter from the Board secretary.

Strupp approached the Board president and stated she heard the president had encouraged Lott to run. The Board president told Strupp and credibly testified in this inquiry that he had not done so. He stated he perceived some indecision on Strupp's part in early 1988 as to whether she would run but does not believe he commented on it to anyone in the community.

Another teaching staff member testified concerning statements Lott allegedly made two or three days after the election. These statements, even if made, are immaterial to this inquiry and are accordingly disregarded.

Before the election, however, this teacher and Lott had a conversation in which Lott stated he was not sure if Strupp would run. The witness believes the conversation took place after Strupp announced her candidacy.

Pupil testimony concerning registration applications tended to be consistent with and to support Lott's testimony on the subject.

Clara J. Strupp telephoned a teaching staff member because she heard much campaigning was taking place in the high school. The teacher told her he had observed Lott photocopying names of pupils. Strupp called and informed the Board secretary. He said he would write a letter to Lott and he did. Strupp later called the principal, asked if Lott has turned in any lists of pupil names and the principal replied that Lott had not. Strupp has not seen the list of names that has been the subject of testimony in this inquiry.

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DISCUSSION AND DETERMINATION

The testimony concerning Strupp's conversation with a neighbor is hearsay. Under N.J.A.C. 1:1-15.5, I may not exclude it. However, I may not use it to support an ultimate finding of fact without more.

It is plain from the evidence of record that candidate Lott did nothing unlawful although a generous sense of discretion should have suggested to him that he do nothing even remotely related to his campaign at school or school-related activities.

I cannot find irregularities in the record as developed. It is only when irregularities are proved and are so gross as to produce illegal votes that would not have been cast or to defeat legal votes that would have been cast, so as to make impossible a determination of the will of the electorate, that an election will be set aside. The Superior Court has set forth

> The rule in our State is firmly established that if any irregularity...is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connnection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.

In re Wene, 26 N.J. Super. 363,383 (Law Div. 1953).

Nothing demonstrated in this record approaches the standard articulated in Wene. I CONCLUDE that although candidate Lott could have been more circumspect, no irregularitites occurred in the annual school election held in the Watchung Hills Regional School District on April 5, 1988 that produced illegal votes that would not have been cast or defeated legal votes that would have been cast.

Therefore, I ORDER that this inquiry be and is hereby concluded with no further action to be taken.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

13 JUNE 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:
Seymour Weiss

6/14/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 16 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
WATCHUNG HILLS REGIONAL SCHOOL	:	DECISION
DISTRICT, SOMERSET COUNTY.	:	
_____	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the ALJ's findings and conclusions and adopts them as his own. Having found no irregularities or illegalities in the election, the Petition of Appeal is hereby dismissed. The Commissioner does, nonetheless, support the ALJ's observations that Candidate Lott could have been more circumspect and that discretion should have dictated that he do nothing even remotely related to his campaign at school or school-related activities.

COMMISSIONER OF EDUCATION

July 22, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3121-88
AGENCY DKT. NO. 103-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.

Arnold Shep Cohen, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: June 3, 1988 Decided: June 17, 1988

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Pursuant to a letter complaint filed by candidate Marian Glantz in accordance with N.J.S.A. 18A:14-63.12, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 5, 1988, in the Old Bridge Township, Middlesex County, school district. The Old Bridge Township was noticed of the inquiry under date of May 10, 1988.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. An inquiry was conducted by the undersigned on June 2 and 3, 1988. Six witnesses were heard and nine documents were admitted into evidence. This initial decision finds several irregularities occurred during the course of the school election but does not find sufficient cause to order a new election.

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The announced results of the balloting for the election of school board members in the Old Bridge district were as follows:

FOR 3-YEAR TERMS
(3 SEATS TO BE FILLED)

McDermott-Nelson	1867
Parente	1490
Hegarty	1345
Glantz	1139
Nash	1039
Sohor	602
Balsam	231 (C-1)

The letter complaint sets forth six specific allegations:

1. Posting of fliers within 100 feet of the polling place at Cheesequake School.

2. Materials distributed by a candidate did not comport with N.J.S.A. 18A:14-97.

3. Said candidate allowed his children to enter Schirra School with campaign material with the express intent of distributing fliers.

4. Said candidate used his position on the Board of Education to obtain addresses of employees. The candidate used the lists to send a letter to employees which was not consistent with N.J.S.A. 18A:14-97.

5. Said candidate attempted to coerce the president of the Amboy Madison Bank into terminating the employment of Board member Edna Gordon in retaliation for an advertisement placed by Gordon in a local newspaper.

6. Said candidate's friend, following a candidates' night, came to me and another candidate separately and told us that "You will get yours!" (P-1).

The president of the Old Bridge Education Association testified that he visited approximately four polls, including the poll at Cheesequake School, on April 5, 1988. He observed fliers and posters on every tree and utility poll. At the Cheesequake School, a utility poll approximately 70 feet from the voting machines and less than 25 feet from the door of the school was girdled with three posters for candidate Hegarty. The witness observed similar conditions at other polling places.

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The witness identified a letter from Robert A. Carrington dated March 28, 1988, to a teacher and her husband (P-2) and a letter to staff dated March 29, 1988, from Michael J. Hegarty (P-3). Several employees who received these letters complained to the witness. He checked into the matter and, on information received from the Old Bridge Post Office, discovered that both mailings came from a postage meter of the Hagerty Funeral Home. However, the return address on exhibit P-2 was Carrington's. There is no reference as to who produced or paid for either exhibit.

The witness identified minutes of the Board meeting of April 12, 1988, the reorganization meeting (P-4). The witness was present at the meeting. He identified references to banks, particularly the Amboy Madison Bank. Id. at 178-79. A resolution to continue use of that bank as a repository for Board funds was defeated. Edna Gordon, who paid for an advertisement inimical to members Hegarty and Cerra, is employed by the Amboy Madison National Bank.

The witness also attended the April 19, 1988 meeting. He observed a confrontation between Gordon and Hegarty concerning the bank.

The witness identified a flier concerning the school election distributed in the Cheesequake Village retirement community (P-6). The flier says it is paid for by the Cheesequake Village Civic Association, 8 Michigan Drive. The witness believes there is no such organization. The address is that of Patrick Salerno, a Board member.

Thomas Jardula, a resident of Old Bridge since 1972 and a librarian in the school system, testified he received a copy of the letter from Hegarty addressed to staff dated March 29, 1988 (P-3). He never authorized release of his address by the Board to any candidate.

Marian Glantz, petitioner, testified. She stated she appeared at the Cheesequake Village Association candidate's night on March 30, 1988. All candidates were present, all spoke and most answered questions. Frank Cerra, then Board president, was present as an observer. Following the program he spoke to Glantz, shook a finger in her face and said, "You'll get yours." Glantz stated she had referred to Hegarty's record during the course of the program. Hegarty, however, did not speak directly to her. Her

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invitation to the program came from the Cheesequake Village Association. She does not believe the Cheesequake Village Civic Association presently is a live organization.

The witness identified exhibit C-1, a combined statement of results of school election dated April 5, 1988. She failed to gain a seat on the Board by 206 votes.

Patrick P. Salerno testified. He is a member of the Old Bridge Board and has served 11 years on the Board, although not continuously. He stated the Cheesequake Village Civic Association is not an association. It is a group of residents who get together before each election to discuss candidates. They have no bylaws, no officers and no official members. The Cheesequake Village Association, on the other hand, must be nonpolitical. It is a formal homeowners organization, is operated not for profit and has bylaws and rules.

Prior to April 1988, the Cheesequake Village Civic Association last was active when the school budget was established. The association is involved in local elections only.

The witness identified exhibit P-6, a flier that urges a no vote on the budget. The witness drew up the document and had it printed by a local establishment (P-7). The flier was hand-delivered to each resident of Cheesequake Village. A committee did exist to "chip in" to raise the money to print the flier. The witness stated no Board member paid anything. The witness prepared the flier sometime between March 25 and 27. He showed it to the informal group, had it printed and distributed the fliers on the day before the annual school election.

Edna Gordon testified. She has been a member of the Board for nine consecutive years and currently serves as president. Exhibit P-5 is an advertisement she took in a local weekly newspaper distributed in Old Bridge on March 30, 1988. She is employed by the Amboy Madison National Bank as a marketing representative. A day or two after the advertisement circulated, the president of the bank spoke to her and said that Hegarty had called him expressing concern about Gordon working for the bank and having access to confidential information. Gordon said the bank president reported he told Hegarty that Gordon has no such access.

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Gordon recounted challenges from Hegarty at Board meetings and stated she now gives up the chair whenever a question even remotely concerning the bank arises.

DISCUSSION AND DETERMINATION

N.J.S.A. 18A:14-97 provides that all school election campaign materials must be properly identified. The name and address of the printer must appear on the face of campaign materials and the materials must also contain the name and address of either the person causing the material to be printed, copied or published or the name of the person who is paying for the materials. This requirement applies to any circular, broadside, statement, advertisement or other printed matter. It does not apply to any bonafide news item or editorial comment published in a newspaper. N.J.S.A. 18A:14-97.3. Patrick Salerno testified that the Cheesequake Village Civic Association is not a formal organization but is more nearly an ad hoc group. However, N.J.S.A. 18A:14-97.2 provides that if printed matter is distributed or the cost thereof is defrayed by an association, organization or committee, then the name and address of the association, organization or committee made be used in compliance with the provisions of this article if there is used therewith the name of at least one person by whose authority, acting for such association, organization or committee, such action is taken. Exhibit P-6 does not identify the name of the printer, N.J.S.A. 18A:14-97, and does not give the name and address of the individual as well as the association causing the matter to be printed, N.J.S.A. 18A:14-97.2. Accordingly, I **FIND** that Patrick Salerno admitted, under oath, to violation of these two statutes.

I **FIND** that election materials endorsing Michael Hegarty were posted within 100 feet of the Cheesequake School polling place. However, without more, I cannot find to whom the statutory violation should be ascribed. Mr. Hegarty is admonished that a candidate can be held responsible for the actions of those working in his behalf. Mr. Hegarty is further admonished that, should he again be a candidate in a school election, he must assiduously comply with all requirements of statute and regulation.

I **FIND** nothing in this record to support a finding that a candidate allowed his children to enter a school in the district with campaign material.

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I **FIND** credible testimony establishes that letters were sent by candidate Hegarty to members of the district staff. I further **FIND** nothing in the record to establish that the candidate improperly came by the names and addresses of staff. Nor can I find any violation of N.J.S.A. 18A:14-97 in the letter sent to staff because each bears the letterhead of the Hegarty Funeral Home and each bears the signature of the candidate.

The letter on Hegarty's behalf by Carrington (P-2) is more in conflict with the requirements of N.J.S.A. 18A:14-97. On the surface, each of these letters (P-2) is an endorsement of Hegarty by Carrington. They bear Carrington's signature and certainly this may be taken to be identification of the name of the person by whom the cost of the printing, copying, or publishing has been defrayed. The envelope bears Carrington's return address. However, the envelope also bears the postage meter imprint assigned to Hegarty's business.

Therefore, Hegarty defrayed some of the cost of this effort in his behalf. His name and address, however, do not appear anywhere on the literature. I **FIND** this to be in violation of N.J.S.A. 18A:14-97. In pertinent part that statute requires that the name and address of the purpose or persons by whom the cost of the printing, copying or publishing was borne must appear on any campaign material.

Although testimony was adduced concerning a conversation between Hegarty and the president of the Amboy Madison Bank, that testimony alone is insufficient to support a finding on the question. Hearsay evidence may not be excluded. However, some legally competent evidence must exist to support each ultimate finding of fact. N.J.A.C. 1:1-15.5.

I similarly **FIND** as to the alleged candidates' night incident. Without some competent evidence in support, it remains merely allegation.

In summary, I have found that Board Member Patrick Salerno has violated N.J.S.A. 18A:14-97 and N.J.S.A. 18A:14-97.2. Board member Hegarty has violated N.J.S.A. 18A:14.97. Hegarty also has been warned concerning N.J.S.A. 18A:14-81 which prohibits display of any printed matter within 100 feet of the outside entrance to a polling place.

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N.J.S.A. 18A:14-104 provides:

> Any person violating any provisions of sections 18A:14-97, 18A:14-97.1 or 18A:14-97.2 shall be a disorderly person and shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.
>
> Any person violating any provision of this chapter for which no penalty is provided shall be guilty of the misdemeanor.
>
> Any corporation violating any provisions of sections 18A:14-99 to 18A:14-102 inclusive, shall also forfeit its charter.

Although the Commissioner of Education and, hence, this tribunal may make findings as to violation of the above-mentioned statutes, neither the Commisioner nor this judge can invoke the penalties prescribed by the Legislature. I **CONCLUDE** that, although the irregularities in this election were not sufficient to require that a new election be held, they must be addressed nevertheless. Therefore, it is **ORDERED** that a copy of the final decision in this matter be forwarded to the Middlesex County Prosecutor for further investigation.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 3121-88

I hereby FILE my Initial Decision with SAUL COOPERMAN for consideration.

17 JUNE 1988
DATE

BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/17/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 20 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF OLD BRIDGE, MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by Petitioner Glantz. In addition, a letter was submitted by the attorney for Michael Hegarty, the candidate about whose election campaign the allegations in this matter are levied.

Mr. Hegarty was not a party in this election inquiry, however, he avers he has been detrimentally affected by it and that he has a clear stake in the final outcome of the case. As such, he believes he is entitled as a matter of fundamental fairness and constitutional due process to be heard at this juncture, notwithstanding the fact that he was never afforded the opportunity to be heard at the outset. Mr. Hegarty takes exception to the ALJ's statement on page 1 of the initial decision that the Old Bridge Board was noticed of the inquiry under date of May 10, 1988, averring that there is absent any record of acknowledgement of service, proof of service or actual service upon the entity known as the Old Bridge Board of Education.

Moreover, Mr. Hegarty contends that it is most disturbing that individuals whose election could be directly affected by the outcome of the litigation were not only not noticed by the party bringing the action, but never required by the court to be noticed of the proceeding. As to this, Mr. Hegarty points to N.J.A.C. 1:1-16.4 which states:

> Where it appears to the judge that a full determination of a case may substantially, specifically and directly affect a person or entity who is not a party to the case, the judge, on motion of any party or on his or her own initiative, may order that the Clerk or any party notify the person or entity of the proceeding and of the opportunity to apply for intervention or participation pursuant to these rules.

With respect to this regulation and the matter herein, Mr. Hegarty argues that:

> ***This rule exists for an obvious purpose: the most rudimentary component of due process is timely notice and a chance to be heard (see discussion infra). It is difficult to understand

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> why the court on its own accord did not avail itself of this administrative process in order to alert the elected board members to the nature of the proceeding and the possibility of the outcome -- an outcome which could conceivably have resulted in the infringement of protected property and liberty interests of these public officials. It is hard to imagine a more compelling matter requiring judicial intervention to assure due process than this one.
> (Letter of June 30 on behalf of Hegarty, at p. 2)

While Mr. Hegarty agrees with the ALJ's conclusion that insufficient cause exists for ordering a new election, he requests that the Commissioner purge the decision of all negative references and findings adverse to him. As to the ALJ's findings and conclusions regarding a violation of N.J.S.A. 18A:14-81 prohibiting election material from being posted within 100 feet of a polling place, he contends that the ALJ should not have gone beyond the fact that it could not be ascertained to whom the statutory violation should be ascribed. Specific objection is made to the ALJ's language that:

> Mr. Hegarty is admonished that a candidate can be held responsible for the actions of those working in his behalf. Mr. Hegarty is further admonished that, should he again be a candidate in a school election, he must assiduously comply with all requirements of statute and regulation.
> (Initial Decision, ante)

Mr. Hegarty believes this statement of the ALJ to be erroneous and that it should be struck from the decision given that there is an absence of any proof whatsoever of either knowledge or intent on his part as to where the materials were placed. He also challenges the lack of legal support for the ALJ's findings that a candidate can be held responsible under N.J.S.A. 18A:14-81 for the actions of other unknown persons.

Mr. Hegarty further objects to the finding that he violated N.J.S.A. 18A:14-97 for failure to be identified as defraying the postage costs for a mailing where his postage meter was used. He points to the language of the statute as requiring that there be

> ***a statement of the name and address of the person or persons causing [election materials] to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.

This requirement, he avers, was met as indicated below when he states that

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> ***The only requirement of the statute is that the name of the person or persons causing the same to be printed, copied or published or defraying any of the costs of printing, copying or publishing is listed thereon. The Judge clearly found that by Carrington's signature appearing thereon and the envelope bearing Carrington's return address that this certainly could be taken to be identification of the name of the person by whom the cost of the printing, copying or publishing has been defrayed. Again, had the decision stopped at that point, there would be no need for our intervention on behalf of Mr. Hegarty. However, the Judge went further and stated that because the envelope bore the postage meter imprint assigned to Mr. Hegarty's business, he would infer that Mr. Hegarty defrayed some of the cost of the printing, copying or publishing of the material. Such a mighty leap is certainly beyond the scope of any evidence presented. If, the Judge had found or inferred that the postage meter imprint implied Mr. Hegarty defrayed the cost of distribution, that might have been more understandable. <u>However, it must notice, that the statute does not require identification of the individual defraying the cost of distribution. The statute only requires the name and address of the individual defraying the cost of printing, copying or publishing the materials</u>. Criminal statutory interpretation requires strict construction. The finding and conclusion by the Administrative Law Judge that utilization of the postage meter of and by itself constitutes violation of <u>N.J.S.A.</u> 18A:14-97 is a finding without support and is clearly in error. No inquiry was ever made as to whether Mr. Carrington reimbursed Mr. Hegarty for the utilization of the postage meter. No evidence exists as to any expenditure by Mr. Carrington [or] Mr. Hegarty for the distribution of the materials involved. Based upon careful analysis, it is respectfully submitted that the Commissioner of Education reverse as to the finding that Mr. Hegarty violated <u>N.J.S.A.</u> 18A:14-97. (emphasis in text)
>
> (Letter, at p. 4)

In addition to the above, Mr. Hegarty urges that it is beyond the proper function of the ALJ to include within a decision's order that a copy of the decision be forwarded to a prosecutor's office for further investigation. He finds this particularly true given the circumstances of this matter where he was never given the opportunity to participate in the proceedings and the evidence

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submitted ex parte was insufficient to support any of the findings and conclusions reached.

Petitioner Glantz's exceptions convey that she generally agrees with the ALJ's findings but objects to the one which found that the allegation with respect to the incident on candidates night remains mere allegation without some competent evidence in support of it. She argues that both her own testimony and that of Edna Gordon is specific as to statements made to them and is completely non-rebutted. Petitioner questions how else, but through a recitation of what occurred by a person who observed what occurred, can a statement be put on the record. Petitioner also avers that (1) the actions of Mr. Cerra and Mr. Hegarty had a chilling effect on both of them; (2) they cannot be overlooked as was done in the initial decision and (3) they are clearly not hearsay under the New Jersey Rules of Evidence. Additionally, she argues that even if the threats to Ms. Gordon's job are considered to be hearsay, they are still admissible and cites the recent Appellate Division decision in In re Cowan, School District of Bernardsville, N.J. Superior Court, Appellate Division, A-1115-86T7, decided May 17, 1988 in support of this.

Upon review of the record in this matter including petitioner's exceptions and the transcripts of the inquiry, the Commissioner concurs with the ALJ that the irregularities under review in this matter do not warrant that a new election be conducted in the Old Bridge School District. The exceptions filed by petitioner do not demonstrate that the ALJ erred in his determination. The testimony of petitioner and Ms. Gordon was admitted by the ALJ but that testimony standing alone does not provide evidence that the election in this matter should be overturned due to illegalities or other irregularities in the voting.

Accordingly, the Commissioner adopts the findings and conclusions of the ALJ that the election in this matter should stand. However, he reserves judgment on the finding that Mr. Hegarty violated the provisions of N.J.S.A. 18A:14-97 in regard to Exhibit P-2 until Mr. Hegarty has had an opportunity to speak on his own behalf as explained below.

Initially, the Commissioner agrees that as a matter of fundamental fairness Mr. Hegarty should have had an opportunity to participate in these proceedings as the allegations certainly involve him. However, it is also emphasized that the Board, through its Board Secretary, was duly noticed through numerous correspondence that an election inquiry was being conducted in this matter. Moreover, notice was provided to the Office of Administrative Law by the Board Secretary that the Board's attorney was not going to be present at inquiry. Thus, while no notice was given to Mr. Hegarty as an individual, and there is no legal requirement for that to occur, the Board as an entity had ample knowledge of the proceedings. Be that as it may, it is determined that this matter shall be reopened to provide Mr. Hegarty an opportunity to defend himself against the allegations herein.

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Therefore, the matter is remanded to OAL for that limited and specific purpose.

As to Mr. Hegarty's assertion that the ALJ exceeded his proper function when he recommended that the decision in this matter be forwarded to the prosecutor's office, such argument is meritless. As explicitly pointed out by the ALJ, while the education laws allow the Commissioner to make findings as to election violations, he does not have the power to invoke the penalties which may be levied against such violations. Thus, if violations are found which may warrant the levying of penalties delineated in law, the appropriate action is just what the ALJ recommended, namely, referral to the county prosecutor and even to the Attorney General's office if the violations are so serious as to warrant that action by the Commissioner. See Milan-Vera et al. v. Bd. of Ed. of Union City, decided by the Commissioner June 15, 1987.

Accordingly, this matter is remanded to the Office of Administrative Law for the sole purpose of allowing testimony from Mr. Hegarty with respect to the allegations herein so as to allow the ALJ an opportunity to reconsider his findings and conclusions with respect to any violations of N.J.S.A. 18A:14-97 by Mr. Hegarty.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 27, 1988

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IN THE MATTER OF THE UNSPORTS-	:	
MANLIKE CONDUCT ALLEGATIONS	:	COMMISSIONER OF EDUCATION
ARISING OUT OF THE CRANFORD-	:	DECISION
RIDGE FIELD HOCKEY GAME OF	:	
OCTOBER 9, 1987.	:	
	:	

For the Petitioners, Weinberg and Kaplow
(Richard G. Kaplow, Esq., of Counsel)

For the Respondent, Sterns, Herbert, Weinroth & Petrino
(Michael J. Herbert, Esq., of Counsel)

This matter was opened before the Commissioner through the filing of a Petition of Appeal by the Cranford Board of Education (hereinafter Cranford) and Renee Dorfman, the Cranford varsity field hockey coach, on April 14, 1988 pursuant to N.J.S.A. 18A:11-3 et seq. and in accordance with N.J.A.C. 6:24. Said petition followed from a decision of the New Jersey State Interscholastic Athletic Association (hereinafter NJSIAA) finding Ms. Dorfman guilty of Charges Nos. 2 and 3 of the following five charges lodged by Ridge High School (hereinafter Ridge) with the NJSIAA Controversies Committee on October 13, 1987 following a varsity field hockey contest between Cranford and Ridge High Schools on October 9, 1987:

1. Following a disputed call, Renee Dorfman, head coach of the Cranford team, refused to follow the directions of the officials to leave the playing field and to return to her sideline position.

2. Renee Dorfman incited the spectators repeatedly screaming "bullshit" at the officials in a manner clearly audible from the sidelines.

3. After the Ridge coach, Jane Cameron, was called to the field by the officials, Renee Dorfman interrupted the conference and assaulted Jane Cameron.

4. The Cranford coaching staff instructed the members of their team not to shake hands with the Ridge High School players following the game's conclusion.

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> 5. The Cranford coaching staff unilaterally removed the junior varsity team from the field thereby breaking a contracted relationship between the two schools to play a junior varsity game. (Exhibit A-9)

Hearing before the Controversies Committee pursuant to Article XIII, Section 4 of the NJSIAA bylaws was held on January 11, 1988, with a written decision of the Committee issuing on January 27, 1988, finding Coach Dorfman guilty of Charges Nos. 2 and 3 and assessing the following penalties:

> 1. Pursuant to Article X of the NJSIAA Bylaws, Coach Renee Dorfman is placed on a period of probation for two years, during which time her conduct is to be observed by appropriate administrators at Cranford High School or any other employing school, and game reports on her conduct are to be submitted to the NJSIAA's central office.
>
> 2. Coach Dorfman is to pay a fine of $150.00 to the NJSIAA no later than April 1, 1988. This fine must be paid by the individual coach and not by the school, booster club or any other source.
>
> 3. Since the conduct of Coach Dorfman lead (sic) to the cancellation of the junior varsity contest, Cranford High School is to reimburse Ridge High School for the sums spent for the officials for that contest; such payment to be made by May 1, 1988.
>
> Both Cranford and Coach Dorfman are advised by this Committee that they may appeal this decision to the Executive Committee of the NJSIAA, pursuant to Article X and XIII of the NJSIAA Bylaws. (NJSIAA Controversies Committee Decision dated January 27, 1988)

Timely appeal was made therefrom pursuant to Article XIII, Section 5 of the Association bylaws to the Executive Committee, which on March 16, 1988 unanimously affirmed the conclusion of the Controversies Committee, with one absention, and approved the penalty, with one absention, by a vote of 32 to 3, with the modification that the fine was to be paid by June 1. After filing their Petition of Appeal, counsel for petitioners and NJSIAA were invited to supplement the record with briefs. Petitioners' brief was filed on May 23, 1988. NJSIAA's brief was submitted on June 2, 1988.

In their Points of Appeal before the Commissioner, petitioners first argue that

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THIS CONTESTED CASE SHOULD BE TRANSFERRED TO AND HEARD BY THE OFFICE OF ADMINISTRATIVE LAW

(at p. 1)

Petitioners aver that they were advised by the Department of Education that this matter would not be transferred to the Office of Administrative Law for hearing as a contested case but, rather, the Commissioner would review the matter entirely upon the record below. Petitioners submit that "said procedural determination was and is legally incorrect and prejudicial, and that Petitioner should be afforded a hearing before an impartial Administrative Law Judge in this case." (Id., at p. 2) They aver they have not been afforded an impartial hearing in this matter.

Pursuant to N.J.S.A. 18A:6-9, the Commissioner is imbued with authority to adjudicate educationally-based matters in a forum that insures educational expertise and objectivity. However, N.J.S.A. 18A:11-3 grants the Commissioner authority to consider appeals from the internal appeals process of NJSIAA. N.J.S.A. 18A:11-3 states in pertinent part:

> 18A:11-3. Voluntary associations regulating conduct of student activities; membership; rules and regulations; appeals
>
> A board of education may join one or more voluntary associations which regulate the conduct of student activities between and among their members, whose membership may include private and public schools. Any such membership shall be by resolution of the board of education, adopted annually. No such voluntary association shall be operative without approval of its charter, constitution, bylaws, and rules and regulations by the Commissioner of Education. Upon the adoption of said resolution the board, its faculty, and students shall be governed by the rules and regulations of that association. The said rules and regulations shall be deemed to be the policy of the board of education and enforced first by the internal procedures of the association. In matters involving only public school districts and students, faculty, administrators and boards thereof, appeals shall be to the commissioner and thereafter the Superior Court. In all other matters, appeals shall be made directly to the Superior Court. The Commissioner shall have authority to direct the association to conduct an inquiry by hearing or otherwise on a particular matter or alternatively, direct that particular matter be heard directly by him. The association shall be a party to any proceeding before the commissioner or in any court. (emphasis supplied)

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Thus while the Commissioner's quasi-judicial authority stems from N.J.S.A. 18A:6-9, direction for procedures in conducting appeals from NJSIAA determinations is embodied in N.J.S.A. 18A:11-3. For the reasons expressed below, petitioners' contention, that only by transferring the instant matter to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. will the instant matter receive an unbiased review, is found to be misplaced. No such obligation exists.

Pursuant to the advisory opinion rendered by the Attorney General of New Jersey on May 15, 1985, the Commissioner may rule on the appeal on the basis of the record made before NJSIAA. In said advisory opinion it is stated:

> Therefore, there is no constitutional requirement that the Commissioner conduct a hearing prior to making his determination on an appeal from a decision of the NJSIAA.***
>
> Nor is the Commissioner required by statute to conduct a hearing on appeals taken to him from decisions made by the NJSIAA. Here, N.J.S.A. 18A:11-3 provides that the Commissioner "shall have authority to direct the [NJSIAA] to conduct an inquiry by hearing or otherwise on a particular matter or alternatively, direct that particular matter be heard directly by him." (Emphasis added). Therefore, it appears that the determination of whether or not a hearing is to be conducted on an appeal of a decision made by the NJSIAA rests within the sound discretion of the Commissioner. Cf. N.J.S.A. 18A:6-9. Accordingly, pursuant to N.J.S.A. 18A:11-3, it appears that an appeal from a determination of the NJSIAA may properly be permitted to follow a course comparable to the ordinary appeal in the judicial setting. Thus, where the original record before the NJSIAA is wholly adequate, the Commissioner may determine the matter on the basis of that record, without additional testimony. Where further evidence is necessary to properly resolve the appeal, the Commissioner may have the record supplemented, either by remanding the matter to the NJSIAA for further proceedings (which, under N.J.S.A. 18A:11-3, do not necessarily have to include a hearing) or by directing that the matter be heard directly by himself, or his designee, at which time he would have the option of requesting the Office of Administrative Law to assist in developing a further record, either by the conducting of a hearing or otherwise. In addition, where the Commissioner determines that the record developed before the NJSIAA is inadequate to permit review, he may hear the matter directly himself or

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> through his designee, or request that the Office of Administrative Law conduct a de novo hearing to develop a new record upon which the Commissioner can base his review. Cf. Laba v. Newark Board of Education, 23 N.J. 364, 382 (1957); N.J.S.A. 52:14F-5(o). The Commissioner, in resolving an appeal on the basis of the record developed by the NJSIAA, should provide the parties with the opportunity to comment in writing upon the materials contained in that record prior to making his determination of the appeal. See Winston v. Bd. of Ed. of So. Plainfield, 64 N.J. 582, 586 (1974).
>
> For these reasons, you are advised that the Commissioner is not required by constitutional mandate or by statute to refer appeals made to him from decisions of the NJSIAA to the Office of Administrative Law for de novo hearings prior to his determination thereof. The Commissioner may properly rule on the appeal on the basis of his review of the record made before the NJSIAA. (emphasis supplied)

The Commissioner deems the record of the proceedings developed at two levels of appeal before NJSIAA, as well as additional briefs submitted by the parties upon the filing of the Petition of Appeal, is more than sufficient to enable him to render a determination with respect to the controversy. Neither do petitioners argue the absence of a full record now before the Commissioner; rather, their contention is that an "objective and impartial disposition" of this matter requires it be transmitted to the Office of Administrative Law. (Petitioners' Points of Appeal, at p. 2) The Commissioner finds no merit in such argument and will proceed to the merits of the matter on the record on appeal from NJSIAA, in accordance with N.J.S.A. 18A:11-3.

Point Two of Petitioners' Points of Appeal states:

> THE RECORD BEFORE THE CONTROVERSIES COMMITTEE FAILS TO SUPPORT THE FACTS ALLEGED IN CHARGE NO. 2 OF THE RIDGE COMPLAINT.

Charge No. 2 of the complaint filed by Ridge High School before NJSIAA on October 13, 1987 speaks to inciting the spectators; Charge No. 3 alleges Petitioner Dorfman pushed the Ridge coach, Jane Cameron. Petitioners submit that the record fails to justify or support the penalties which were imposed for Charge No. 2 and Charge No. 3. They claim the Controversies Committee's review of the facts produced at hearing, which appear at pages 3-5 of the written decision "is replete with misstatements of the testimony of key witnesses, as well as crucial omissions of testimony." (Petitioners' Points of Appeal, at p. 4) Petitioners' aver Ms. Dorfman used a foul expletive only once, and only after Ms. Dorfman had attempted to get Ms. Blasse, one of the officials at

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the game, to correct a mistaken call, "whereupon Blasse *** had told Dorfman to 'shut her 'f'ing' mouth.' (T27, 5-7)." (Id., at p. 5) Petitioners aver the Controversies Committee ignored these circumstances and that it was "inequitable and harsh to barely slap the wrist of an official who admits a clearly unprofessional and inappropriate action, while imposing a severe penalty upon a head coach with an unblemished and superlative record, on account of her response to having been abused by the official." (Id.)

Petitioners rely on the testimony of the two officials in support of this position particularly as it relates to Charge No. 3 and cites excerpts from the transcript as further support of their position. Petitioners argue that Finding of Fact No. 3 states that Coach Dorfman repeatedly yelled abuse and profanities from the sidelines prior to the scoring of the goal.

> Yet no witness testified that there was any yelling or profanity except during a very short exchange after the disputed goal. Even Jane Cameron, the Ridge coach, testified that the alleged profanity occurred after the goal (T61, 8-16), and her version in that regard was supported by Laurence Smith, the Ridge Athletic Director (T77, 17-25). In short, no one testified to the facts set forth in the Committee's Finding of Fact No. 3, and Charge 2 was never proven by a preponderance of competent evidence at the hearing.*** (emphasis in text)
> (Id., at p. 6)

Further, with regard to Charge No. 2, petitioners ask that the Commissioner review a videotape taken by Cranford students of the game in question. Said tape was not considered by the Executive Committee in its deliberations of the Controversies Committee's determinations because it was not before the latter body at the time of its hearing. Petitioners suggest the tape discloses no profanity and, further, that "Coach Dorfman can be seen reacting in a professional and completely appropriate manner." (Id., at p. 7) Petitioners add that a copy of the tape was supplied to counsel for Ridge prior to the January 11, 1988 hearing.

Point Three of petitioners' Points of Appeal states:

> THE COMMITTEES FAILED TO CONSIDER SUBSTANTIAL MITIGATING CIRCUMSTANCES WITH REGARD TO CHARGE THREE.

Petitioners submit that the totality of the circumstances depicted by the witnesses substantially mitigates the severity of Charge No. 3.

Petitioners contend "extreme provocation and frustration" (Id.) excuse Ms. Dorfman's actions. Further, they aver that even the coach who was pushed "recognized the presence of precipitating

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facts***" (Id., at p. 8) quoting T73, 4-8 wherein Coach Cameron stated:

> She was inflamed. She was inflamed because of a call. *** They were trying to get the call straightened out.

Petitioners claim two other witnesses of Ms. Dorfman testified that the fans added to the tension at the game by shouting obscenities and derogatory terms, citing the transcript at T125, 16-25; T129, 2-8; T133, 7-25 and T135, 12-17.

Further, petitioners aver that the testimony of Athletic Director Smith of Ridge High School "lacks credibility and competency, rather than the testimony of the witnesses who supported the actions of Coach Dorfman." (Id., at p. 9) Finally, in regard to this Point of Appeal, petitioners submit that

> the penalties imposed by the Controversies Committee are unduly harsh and excessive, and are disproportionate to the facts which were actually proven at the hearing. It was undisputed at the hearing that there have never been any charges of any type against Renee Dorfman at any time (T 169, 23 to T 170, 3). This isolated incident is in fact the only criticism which has ever been leveled at this coach. Under these circumstances, even giving Ridge the benefit of any favorable inferences which can be drawn from the record, a 2 year suspension for this "first offense" seems unduly punitive. (Id., at pp. 9-10)

Point Four of Petitioners' Points of Appeal avers:

> ARTICLE XIII, SECTION 8 IS VIOLATIVE OF DUE PROCESS AND PUBLIC POLICY, AND SHOULD BE DECLARED VOID AND UNENFORCEABLE

Petitioners contend the amendment to the NJSIAA rules which imposes cost of litigation and counsel fees incurred by the Association member schools on any member school which institutes an unsuccessful appeal before the Commissioner of Education "is unconstitutionally overbroad in its sweep and effect, and that it violates long standing public policy against barriers to colorable and good faith litigation." (Id., at p. 12) They claim such provision represents

> the worst kind of blind retreat from the obligation to find the truth and render a fair and just result in this type of case. The chilling effect of this completely self-executing rule is enormous; the Association has announced as its stated policy that good faith resort to

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> the appellate process should be frustrated and discouraged, if not made completely financially impossible for aggrieved member schools.
> (Id., at pp. 13-14)

Citing among other cases Coyne-Delaney Co., Inc. v. Capitol Development Board of State of Illinois, 717 F.2d 385 (7th Cir. 1983) and Martin v. American Appliance, 174 N.J. Super. 382 (Law Div. 1980) for the "American Rule" that the prevailing litigant is ordinarily not entitled to collect an attorney fee from the loser, petitioners claim "[t]he failure of Article XIII, Section 8 to distinguish between cases which are advanced colorable and in good faith, and those cases which are frivolous or baseless must be seen as a fatal defect in this provision.***" (Id., at pp. 14-15) Citing Breshears v. Malin Oil Co., 671 S.W. 2d 402 (Mo. App. 1984), petitioners aver, "Courts have steadfastly held to the position that appeals containing even the slightest colorable merit must not be 'chilled' by the prospect of paying an adversary's legal fees." (Id., at p. 15)

Finally, petitioners anticipate that counsel for NJSIAA will argue that membership in the Association "contractually 'binds' member schools to the payment of adversary's legal costs.***" (Id., at pp. 15-16) In this regard, petitioners state:

> If, however, there is any "contract" at all, it surely is an illegal contract of adhesion. There are no options or opportunities to bargain at arms length regarding the terms of any "contract". Instead, member schools are given an opportunity, on a purely "take it or leave it" basis, to join the Association and to accept all decisions of the Association, including all assessments for costs, or to simply and summarily forfeit the right for the entire school district to participate in any state sanctioned interscholastic athletic events. There simply isn't anything "contractual" within the context of NJSIAA membership, much less any factual or legal basis for the unilateral levy and execution of costs pursuant to Article XIII, Section 8.
> (Id., at p. 16)

Petitioners submit that the decision of NJSIAA should be set aside and the complaint brought by Ridge High School dismissed.

NJSIAA takes issue with petitioners' allegation that Coach Dorfman's offensive comment was uttered only once and that, even if there had been a pushing of Coach Cameron, it was provoked by the surrounding circumstances, including Coach Cameron's offensive remark. Specifically regarding Charge No. 2, NJSIAA claims:

> ***Coach Cameron testified that she saw Renee Dorfman walk back and forth on the sidelines, flailing her arms for ten minutes yelling

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"bullshit." (T65:4 to 16). Mr. Smith testified that Ms. Dorfman "turned around and was walking, threw up her arms and yelled, 'Bullshit, bullshit, bullshit', I don't know how many times but very loud." (T77:16-21). Finally, Ridge Principal Pennella made the following observation concerning Coach Dorfman's behavior:

> ...At that particular time, when the officials were at the furthest point in their discussion from the sidelines was when Miss Dorfman was moving around the field waving her hands, moving toward her bench, moving back off the sidelines and waving her arms and screaming "Bullshit" which might be important only in that the officials stated they didn't see it. They were locked in discussion at the particular time this was going on. It was an item of explicit concern at that particular time because I was concerned about crowd control and when a coach behaves this way. I know from working inside the gyms -- one of the reasons I go to the gyms is I'm always concerned about crowd control, and that's not only the students but adults. I have to be concerned.
>
> What was going on was provocative behavior because of the screaming and the waving of the arms. It's the kind of thing I don't like to see. I wasn't pleased with it when I was watching what was going on. That's what concerned me. That's why I wasn't perhaps heard by the officials. They were in their discussion head to head at that particular time. [T94:7 to 95:7] (emphasis supplied)
>
> (NJSIAA Brief, at p. 6)

Concerning Charge No. 3, the alleged pushing of Coach Cameron, NJSIAA contends that although Coach Dorfman and her assistant coach, Kathleen White, testified that Ms. Dorfman never pushed Coach Cameron, petitioners' brief apparently concedes that a push took place but now argues that it was the result of provocation by the Ridge coach and the surrounding circumstances. "Nevertheless, lest the Commissioner have any doubt about the guilt of Renee Dorfman in pushing a rival coach, it should be emphasized that five separate witnesses testified that such a pushing took place." (emphasis in text) (Id., at p. 7) It then recites passages from the transcript of the testimony of Official Blasse, Official Ralston, Jane Cameron, the coach who was allegedly pushed,

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Athletic Director Smith and Principal Pennella, both from Ridge High School, all of whom, NJSIAA argues, corroborated the fact that such pushing occurred.

Concerning the use of profanity by Coach Blasse and whether that mitigates Coach Dorfman's alleged conduct, NJSIAA contends:

> It is true that official Blasse confessed that she told Dorfman to "shut her 'f'ing' mouth". (T27:5-7). However, as the Committee found, this official used that totally unacceptable expression in the middle of the field "out of earshot of anyone but the coaches". (see Decision footnote, P5). Second, that expression was issued by official Blasse after Coach Dorfman yelled "Bullshit" and other profanities from the sideline for several minutes. Third, it must be emphasized that the officials were summoned to the Controversies Committee hearing with the assurance that they would not be penalized for any testimony that they provided and were never charged with any offenses. (T16:16 to 17:16). Finally, the testimony of Ms. Dorfman at the hearing clearly refutes any inference that the profanity used by the official provoked her own unprofessional conduct:
>
> > ...That's when Angie [Blasse] turned to me and said to me "Keep your f'ing mouth shut***," and I laughed and I said "Yes, Ma'am." [T147:3 to 9] (emphasis supplied).
>
> The Petitioners take the unacceptable remark of the game official completely out of context. It was uttered at midfield out of earshot of everyone but the two coaches, in contrast with Coach Dorfman yelling profanities in front of students and spectators alike for several minutes. The official's comment was made after, not before, Ms. Dorfman's vulgar onslaught. Rather than viewing Official Blasse's comment as provocative as the Petitioners' brief now contends, the Cranford coach viewed it with humor when it was uttered. Understandably, no one ever filed charges against the official and her testimony was only secured under oath with the assumption that no such charges were pending. In fact, at the appeal hearing it was pointed out that it would have been unfair to penalize the official who had not [been] charged. (AT81:8 to 83:25). Even the Petitioners' counsel was obliged to admit as much. (AT84:1-14). (emphasis in text) (Id., at pp. 8-9)

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As to the videotape's admissibility into the record at this juncture of the proceedings, NJSIAA contends that "***even if this evidence was probative, they never attempted to offer it into evidence before the Controversies Committee." (Id., at p. 9) NJSIAA contends it must be bound by its own rules in this regard, wherein it states at Article XIII, Section 5 of the NJSIAA Bylaws "that 'the appeal shall be confined to the record developed before the Controversies Committee.' (see AT67:9 to 73:10)" (Id., at p. 9)

The Association contends that had the tape been considered by the Executive Committee, it would have "not only violated its charges under Section 5 of the Hearing Procedures, but would have been reviewing the decision of the Controversies Committee on the basis of a substantially different record. Such a procedure is legally impermissable (sic). See Brotherhood of Railroad Trainmen v. Palmer, 47 N.J. 482 (1966)." (Id., at pp. 9-10)

In response to petitioners' contentions regarding Article XIII, Section 8, which imposes litigation costs on schools which unsuccessfully appeal non-eligibility decisions of NJSIAA, the Association avers at Point II:

> ARTICLE XIII, SECTION 8 OF THE NJSIAA BYLAWS IS A VALID RULE SERVING A PUBLIC PURPOSE AND SHOULD NOT BE REJECTED BY THE COMMISSIONER
>
> (Id., at p. 18)

NJSIAA points out in its brief the history of litigation of the organization before the amendment in question was adopted and explains the process by which the membership of the organization was proposed, considered and adopted. "The purpose of the amendment was to discourage school boards from mounting frivolous, non-educational challenges merely to appease local constituents; challenges that consumed both the time and the scarce resources of the NJSIAA." (Id., at pp. 18-19) Reciting case law on the Commissioner of Education's authority in approval of all amendments to the constitution, bylaws, rules and regulations of the Association, including B.D. v. Cumberland Regional, supra, and Northern Highlands, supra, NJSIAA contends:

> It is important to point out that for nine months throughout 1985, this new amendment was openly debated among the members of the NJSIAA. The Cranford Board of Education was free to criticize it and to lobby against its adoption. During that debate, the purpose for the new rule was clearly expressed before the Advisory Committee, at regional meetings, at the Executive Committee and at the annual meeting. That purpose was to curb the practice engaged in by several boards of education which, because of local political pressure, would bring frivolous appeals, knowing that there was little hope of success, with a tremendous financial impact on the other members of the NJSIAA. (Id., at pp. 19-20)

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The Association further contends that "the relationship of an individual member to a voluntary association is in the nature of a contract." (Id., at p. 21) Citing Calabrese v. PBA Local No. 76, 157 N.J. Super. 139, 146-147 (Law Div. 1978), among other cases, NJSIAA suggests that the courts have also held that unless that contract can be shown to violate public policy, the courts will not interfere with its terms. It argues:

> If the Cranford Board of Education believes that Article XIII, Section 8 is wrong, then it should try to amend its "contract" by proposing a repeal of this bylaw through the available internal processes of the NJSIAA. Otherwise, the 440 other member schools will be asked to shoulder the burden of defending rules of a voluntary association to which each member has agreed to abide. Both the contract principles condoned by our Supreme Court, see Alcoa Edgewater No. 1 Credit Union v. Carrol[1], supra; Cohen v. Fair Lawn Dairies, Inc., 44 N.J. 450, 452 (1965), affirming 86 N.J. Super. 206 (App. Div. 1985), and sound public policy support approval of this rule by the Commissioner of Education."
> (Id., at p. 23)

At Point III of its brief, NJSIAA submits:

> THE COMMISSIONER SHOULD NOT SUBSTITUTE HIS JUDGMENT FOR THAT OF THE NJSIAA (Id., at p. 24)

NJSIAA avers there is no claim of any violation of due process nor is there any contention made by petitioners that any rule or regulation of the NJSIAA has been violated. Rather, avows NJSIAA, "the Petitioners urge the Commissioner to assess the credibility of the testimony differently than the relevant NJSIAA Committees had, and to substitute his own view of that same evidence." (Id., at p. 24) Relying upon Pascack Valley Regional High School District v. NJSIAA, decided by the Commissioner August 19, 1987 among other cases, NJSIAA contends the Commissioner has held that "he will not reverse a decision of the NJSIAA and grant relief unless the Petitioner presents 'compelling reasons.'***" (Id., at p. 25)

Citing Deptford Tp. Bd. of Education v. Olympic Conference and NJSIAA (unpublished) N.J. Superior Court, Appellate Division, Docket No. 3259-83T2, decided June 21, 1985), NJSIAA avows:

> That court held, as the Commissioner has in numerous cases, that the focus of any review should be (a) were the rules of the Association followed?; and (b) was fundamental due process accorded to the appealing party? If both questions are answered in the affirmative, and there is substantial (as opposed to predominate) evidence to support the action of the NJSIAA,

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> then the Commissioner is required to sustain the decision of the State Association as a matter of law. (Id., at p. 26)

NJSIAA contends the evidence to sustain the two charges against Coach Dorfman is overwhelming. "This is a case in which five separate witnesses testified under oath that this high school coach committed unsportsmanlike conduct, by verbally and physically assaulting other professionals, in front of dozens of impressionable students. It was conduct that was so outrageous that the contest had to be cancelled for the health and safety of the participants." (Id.) NJSIAA contends that the Commissioner should support the efforts of these local educators to require proper standards of conduct among teachers and coaches. "If those efforts are compromised, then the NJSIAA serves no purpose." (Id., at p. 27) NJSIAA urges that based on the record before it the decision of NJSIAA should be affirmed and Article XIII, Section 8 of NJSIAA Bylaws should be approved.

Based upon his careful and independent review of the record below which, it is noted, includes the transcripts of the hearing held before the Controversies Committee and before the Executive Committee of NJSIAA, the Commissioner affirms the decision of the Association for the reasons expressed in the report issued on January 27, 1988 from the Controversies Committee, later affirmed and adopted by the Executive Committee. He adds the following.

The Commissioner's review of the record supports the Controversies Committee's conclusions that Coach Dorfman repeatedly shouted obscenities from the sidelines and that she pushed Coach Cameron. It is noted that petitioners' most recent submission concedes that both incidents did occur. Whether she uttered expletives once or repeatedly, the Commissioner finds Ms. Dorfman's angry outbursts entirely unacceptable under any circumstances. As noted by Dr. Pennella:

> I think I indicated before this is a bottom line kind of issue. It's what this association is supposed to be about and what we're supposed to be about as administrators, and that's to encourage the right kind of behavior among kids. They are modeling something that is exactly contrary to what we're supposed to be modeling. I felt that was the case here that had to be addressed. (Tr. 100)

While the Commissioner is aware of the exasperations and frustrations a teacher faces be it in the classroom or on the field of play, a teaching staff member is held up as a model of good deportment, good sportmanship and good citizenship. As stated in In re Fulcomer, 1962 S.L.D. 160, 162, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education 1966 S.L.D. 225, reversed and remanded 92 N.J. Super. 404 (App. Div. 1967), decided by the Commissioner 1967 S.L.D. 215:

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> ***While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.

In the Commissioner's judgment, Coach Dorfman's lack of self-discipline both in her verbal tirade and in pushing Coach Cameron is inimical to the exemplary behavior expected of a teaching staff member. The Commissioner finds it appropriate to repeat the admonition found in In re Sammons, 1972 S.L.D. 302 wherein he said:

> Of *** concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly process of public education. *** He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.*** (emphasis supplied) (at 321)

Thus, the Commissioner finds entirely without merit petitioners' protestations that circumstances excuse Coach Dorfman's poor sportsmanship and lack of professionalism. He concurs with the determinations of those bodies finding Ms. Dorfman guilty of Charges Nos. 2 and 3 of the complaint filed with NJSIAA by Ridge High School on October 13, 1987. Moreover, the Commissioner finds no basis for overturning the determination of the Executive Committee and of the Controversies Committee assessing the following penalties:

1. Probation for two years [erroneously stated by petitioners as two years suspension] during which time her conduct is to be observed by appropriate administrators at Cranford High School or any other employing school, and game reports on her conduct are to be submitted to the NJSIAA's central office.

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2. Coach Dorfman is to pay a fine of $150.00 to the NJSIAA ***. This fine must be paid by the individual coach and not by the school, booster club or any other source.

3. Since the conduct of Coach Dorfman lead (sic) to the cancellation of the junior varsity contest, Cranford High School is to reimburse Ridge High School for the sums spent for the officials for that contest***. (Decision of the Controversies Committee dated January 27, 1988)

4. Costs of suit, including attorney fees, pursuant to NJSIAA ByLaws Article XIII, Section 8.

In regard to the penalties assessed, the Commissioner notes that he will not substitute his judgment for that of NJSIAA where procedural due process has been afforded the appellant unless compelling reasons are provided in the record for him to do so. See Pascack Valley Regional, supra. No such compelling reasons exist in the record before him.

Moreover, as to assessment of costs of litigation, including attorney fees, the Commissioner is in accord with the argument proffered by NJSIAA in this regard.

> Pursuant to N.J.S.A. 18A:11-3, when Cranford adopted the annual resolution renewing its membership with the NJSIAA, it accepted that new amendment as part of its own board policies.
>
> ***
>
> If the Cranford Board of Education believes that Article XIII, Section 8 is wrong, then it should try to amend its "contract" by proposing a repeal of this bylaw through the available internal processes of the NJSIAA. Otherwise, the 440 other member schools will be asked to shoulder the burden of defending rules of a voluntary association to which each member has agreed to abide. Both the contract principles condoned by our Supreme Court [cites omitted] and sound public policy support approval of this rule by the Commissioner of Education.
>
> (NJSIAA's Brief, at pp. 20, 23)

Moreover, the Commissioner finds no merit in petitioners' argument citing Satellite Gateway Communications, Inc. v. Musi Dining Car Co., Inc., et al., 110 N.J. 280 (1988) for the proposition that the New Jersey Supreme Court has placed substantial limitations on the obligation to pay attorney fees to an adversary. The Commissioner is again in accord with NJSIAA that that decision

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supports, rather than undermines, NJSIAA's position. The Supreme Court provided in that case an exception for the general rule disallowing that such fees be paid by opposing counsel:

> However, the Rule [disfavoring granting counsel fees] does not "preclude such an allowance where the parties have agreed thereto in advance by stipulation ... or other agreement or contract...." Pressler, Current N.J. Court Rules, Comment R. 4:4-42-9 (1988); see Department of Envtl. Protection v. Ventron, supra, 94 N.J. at 504 (1983); Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442, 448 (1965). Thus, a party may be contractually obligated to pay attorneys' fees.*** (at 286)

The Commissioner finds merit in NJSIAA's position that the relation shared between an individual member of a voluntary association and the organization is in the nature of a contract. See Calabrese v. PBA Local No. 76, supra, wherein the Appellate Division stated:

> Private organizations must have considerable latitude in rule-making in order to accomplish their objectives, and their private rules are generally binding on those who wish to remain members. [citations omitted]
>
> ***
>
> The constitution and by-laws of a voluntary association become part of the contract entered into by a member when he joined such association. By the same logic, any duly adopted additions or amendments to such constitution and by-laws during the continuance of such membership is equally binding on the member. [citations omitted] (157 N.J. Super. at 146-147)

Thus, the Commissioner dismisses as being without merit petitioners' suggestion that "if, however, there is any 'contract' at all, it surely is an illegal contract of adhesion."

Petitioners further rely on the same newspaper article in which Satellite, supra, is mentioned for reference to recently enacted legislation (Chapter 46, Laws of 1988, N.J.S.A. 2A:15-59.1) which provides for payment of costs and attorney fees by the opposing side in certain circumstances where the suit is deemed "frivolous."

Here again the Commissioner is in accord with NJSIAA. It is not for the Commissioner to substitute his judgment for that of the Association in establishing the rules by which it governs itself nor the procedural protections to be afforded its members, unless found to be unreasonable. The record before him convinces the

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Commissioner that the process by which the amendment in question was proposed, debated and ratified was properly undertaken and executed. Petitioners do not argue otherwise. Moreover, Cranford, through its submission of May 20, 1988, concedes that Coach Dorfman used profanity and did, in fact, push Coach Cameron, "but is unwilling to discipline that staff member. Instead, it excuses her actions and presses an appeal that can only be categorized as frivolous, irrespective of the consequences to standards of proper conduct, time and costs." (NJSIAA's Brief, at p. 23)

The Commissioner finds that the proper avenue by which Cranford might seek to alter the status quo concerning Article XIII, Section 8 is through the internal processes of NJSIAA. N.J.S.A. 18A:11-3 et seq.

Accordingly, NJSIAA's actions are affirmed for the reasons stated in its Controversies Committee's report dated January 27, 1988, affirmed at Executive Committee meeting March 16, 1988. Costs of attorney fees and litigation to be assessed against petitioners.

COMMISSIONER OF EDUCATION

July 28, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3566-87
AGENCY DKT. NO. 323-9/86
(OAL DKT. NO. EDU 6765-86, REMANDED)

ANTHONY FIORELLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: April 18, 1988 Decided: June 16, 1988

BEFORE **RICHARD J. MURPHY**, ALJ:

Petitioner, Anothony Fiorello, appeals from the action of the respondent, South Plainfield Board of Education, in withholding his increment for the 1986-87 school year under N.J.S.A. 18A:29-14. The Board claims that it acted reasonably for good cause based on petitioner's conduct with respect to final exams as discussed below. The issue is whether the action of the Board in withholding petitioner's increment was arbitrary, capricious and in bad faith in that it was not based on reasons of inefficiency or other good cause. This opinion recommends that the Board's action be upheld.

PROCEDURAL HISTORY

Anthony Fiorello filed a petition of appeal on September 23, 1985, which was transmitted to the Office of Administrative Law for hearing as a contested case on October 8, 1986. A prehearing conference was held on December 8, 1986, and a decision

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approving a settlement by the parties was issued on April 13, 1987. That settlement was rejected by the Commissioner and remanded to the Office of Administrative Law on May 22, 1987. A conference was held between the parties on June 23, and an additional hearing scheduled for November 20, 1987, which was adjourned at the petitioner's request. A subsequent hearing scheduled for January 8, 1988, was adjourned because of illness of the judge and a later hearing slated for March 18, 1988, was adjourned because of the unavailability of witnesses. The matter was heard to completion on April 18, 1988, and the record closed on that date.

FINDINGS OF FACT

The following facts are not in dispute. Petitioner is a tenured English teacher who has been employed for 17 years within the South Plainfield District. On June 25, 1986, the principal of the South Plainfield High School, James Dowden, recommended that the petitioner's annual salary increment be withheld (J-1). That action was taken on the basis of recommendations made by Barbara Federer, then supervisor of English and reading in grades nine through 12, who is responsible for curriculum coordination, as well as supervision and evaluation of students. Dowden's evaluation of Mr. Fiorello (based on Federer's report) noted "several grade concerns" regarding petitioner's handling of final exams and related tasks. Dowden, who had not personally observed the petitioner, criticized his performance in the following areas:

1. Scaling of exams: It was alleged that Fiorello had scaled exam results to the English 163 results in violation of an instruction given by his supervisor, Ms. Federer at the begilnning of the school year and repeated in mid June 1986;

2. Security of final exams: It was alleged that petitioner read to his class actual questions from the English 162 exam;

3. Require review for final exams: It was alleged that petitioner disregarded the policy of conducting five days of review by showing the film On Golden Pond to students in the period prior to the final exam;

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4. Development of final exam for English 163: Petitioner was alleged to have not adequately revised the exam when requested to include greater emphasis on skill application and writing as a opposed to recall. Some questions were also critercized as having insufficient bearing on materials covered in the course;

5. Preparation of final exam: It was alleged that the final exam included spelling errors and missing questions;

6. Inadequate use of numerical averages.

Prior to this negative June evaluation, Fiorello had been evaluated on March 6, 1986, by Barbara Federer and received a rating of one (which is the highest out of three ratings) in all categories (J-2). The only area of suggested improvement was use of more "active instructional methods, particularly for students with low level ability."

In a written response to the adverse June evaluation, Fiorello acknowledged that he scaled the exams but states that this was a common practice not barred by written policy and necessitated in this instance by the administration's improper clerical preparation of the final exams. He admits use of exam questions in the final review, but defends this as proper and laudable in order to give students an idea of the type of questions confronting them. As for the required days of review, he maintains that he exceeded the minimum number of review days and showed a movie only as an innovative technique in the last hours of a long school year. With respect to the development of the final exam, Fiorello noted that the exam had been read and approved by his supervisor and that the final exam was acceptable. He notes that the typographical errors in missing questions in the final exam were brought to the attention of students during the review and on the day of the exam. His letter also maintains that his numerical averages were accurate.[1]

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[1]The actual exam papers could not be located by the Board and may have been inadvertently destroyed.

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The Board policy on withholding increments provides that:

> As a general policy, the Board will not withhold a salary increment on the basis of a single poor evaluation or a single incident except in flagrant cases. A staff member will generally be given a minimum of days to demonstrate the effectiveness of the recommended remedial action before punitive action is taken. (P-1).

The Board policy further provides for progressive penalties including verbal warnings, written warnings, nonrenewal of nontenured employees, withholding of increments and preferral of charges against tenure employees. The recommended penalty for a first infraction for insubordination by tenured teachers is withholding of an increment, subject to the general policy set forth above.

As to petitioner's alleged insubordination on the scaling of grades, the Board presented testimony by Barbara Federer who claimed that she had advised all teachers verbally at the beginning of the year not to scale English exams. This policy was not put in writing, but Principal Dowden testified that had he orally approved of it and Assistant Principal Robert Doggett also recalls a meeting at which Federer advised staff not to scale exams but to grade them on straight numerical basis. Other departments were permitted to scale in 1986, and petitioner claims (without being contradictived) that English exams were permitted to be scaled in previous years. Petitioner also denies being verbally advised by Federer at the beginning of the 1986 school year not to scale exams. He admits that on or about June 16, he was directly advised by Ms. Federer not to scale an exam, after she overheard him discussing the possibility of scaling with another teacher. Petitioner also concedes that he scaled the exam grades desite this direction. He claims that the scaling was necessary because of clerical errors made in the preparation of the exam, including missing questions. By scaling, petitioner intended to give students a number of points on the exam above the raw point score in order to compensate for the inadequately prepared test: in other words, students were to be given credit for the missing questions. As indicated, the actual tests are no longer available. The grade collection sheets for the semester indicate that a number of grades were changed (most of them lowered) (J-4) in that of the two English sections taught by petitioner, 12 students out of 20 failed in one section and nine out of 14 failed in the other. As a result of the scaling, four students who failed the final were initially allowed to pass and later failed without the scaling.

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Federer also claimed that when she overheard the petitioner discussing scaling and intervened that petitioner suggested that the fact that he intended to scale need not be brought to the attention of the principal. Petitioner denies this and also claims that he initially thought Federer's statement on scaling was a comment and not a directive. He thus went ahead and scaled the exams. When this was discovered by Federer on or about June 23, 1986, she ordered that he regrade the exam to eliminate scaling, which he did. He denies Federer's allegation that he requested that the matter not be brought to the attention of the principal, and notes that Federer reprimanded him for scaling in front of a number of members of the English Department: thus, there was no cover-up suggested on or about June 23, when Federer questioned the petitioner about his scaling contrary to her direction. With respect to the scaling, I **FIND** as a matter of **FACT** that the petitioner was advised verbally at the beginning of the school year not to scale exams, and was reminded of this restriction on or about June 16, when Barbara Federer overheard him discussing the possibility of scaling and directed him not to use that practice. I further **FIND** that he did scale the exams contrary to the this instruction, although he subsequently unscaled them when ordered to do so by Ms. Federer.

Petitioner does not dispute that he read actual final exam questions to his class in review for the test and I **FIND** this as a matter of **FACT**. Petitioner defends this practice as an exceptable review method. I further **FIND** that there is no written policy by the Board as to providing students with actual exam questions, nor was petitioner warned verbally as to this practice. Petitioner claims that he did not identify the questions as being from the actual exam, but the Board nonetheless finds this practice totally unacceptable.

There is also no dispute that the petitioner showed part of the film On Golden Pond to students in his English 162 and 163 classes in the last afternoon before exams. He claims, and the Board does not dispute, that he had already completed more than the required days of review and that the movie was shown in the closing hours of the school year when students attention was lagging. I **FIND** as a matter of **FACT** that petitioner provided the minimum days of review required and that there is no policy prohibiting the showing of movies or other activities after completion of the necessary final exam review.

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As to the development of the final English 163 exam, petitioner claims and the Board does not dispute that all questions were submitted in advance to supervisor Federer and changes requested by her were made. Federer's basic criticism was that the exam did not sufficiently emphasize analytical skills and excessively relied on the student's recall. There were also complaints from students as to whether the questions in the exam adequately covered the materials addressed in class. There is no dispute that the examine did not include questions on some works referred to by lesson plans (Gulliver's Travels and A Modest Proposal) and that other texts mentioned in the lesson plans were not covered by the exam. There is also no dispute that petitioner covered Hamlet for four weeks of the course, but only included four questions on the exam out of 154 items. Petitioner defends the content of the exam by noting that it was not possible to cover all matters gone over in class and that other questions dealing with matters beyond the class were general in nature. I **FIND** as a matter of **FACT** that Barbara Federer reviewed the final exam before it was administered.

Petitioner also concedes that a number of typographical errors were made on the exam, including mispelling of such words as literature ("literautre") and that several questions were omitted altogether. (Numbers 87 through 91) (J-3). He testified that both he and a collegue determined to make corrections orally to the class on the day of the exam and to scale the test to give credit for the missing questions. There is no dispute on this point and I **FIND** it as a matter of **FACT**.

There is also no dispute that petitioner did not keep numerical averages in the precise manner required and that he was directed by his supervisor to go back and compute the correct averages. Principal Dowden testified that teachers were required to keep numerical averages to be the basis of grading in which an A would be 92 to 100, a B 91-83, a C 74-82, a D 55-73, and anything below 64 a failing grade. Petitioner claims, and the Board does not dispute, that Federer did not direct numerical grades until after the final exam and that he complied when requested to make the necessary calculations.

After the final exam, a number of students and parents complained about its contents and grades received and these complaints were brought to the attention of Supervisor Federer and Principal Dowden. Petitioner contended, and the Board did not contradict, that his class included a number of "low track" seniors who had academic difficulties and needed to pass the English course in order to graduate.

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DISCUSSION AND CONCLUSIONS OF LAW

The question presented is whether the action of the Board of Education of South Plainfield in withholding Anthony Fiorello's annual increment was arbitrary, capricious and in bad faith in that it was not based on reasons of inefficiency or other good cause. The State Education Law provides:

> Any board of education may withhold, for efficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded role call majority vote of the full membership of the Board of Education. . . . N.J.S.A. 18A:29-14.

While the Board of Education has the statutory authority to withhold a teacher's increment and salary, such a denial is arbitrary where the teacher lacks knowledge of the criteria used as the basis for the withholding. See, Basile v. Board of Education, 2 N.J.A.R. 199 (1980). As the determiner of disputes arising under Education Law, the Commissioner of Education has the authority to decide whether the action of a board of education in withholding an increment is arbitrary and capricious and without reasonable basis. Although he is not to substitute his judgment for that of local boards, the Commissioner may weigh the reasonableness of Board policies underlying discretionary actions. The Board of Education of South Plainfield has adopted a policy on staff infractions and increments, as discussed above, which provides for withholding of an increment on a first infraction for insubordination. The policy also makes clear that an increment is not to be withheld on the basis of a single poor evaluation or single incident except in flagrant cases in that teachers should be given a 90-day period to take remedial action.

In this case, all was well with petitioner's evaluation in March. But in June, several incidents concerning petitioner's handling of the final English exam called his favorable evaluation into question and lead his superiors to recommend that his increment be withheld. There is evidence in the record demonstrating by a preponderance of the credible proof, that petitioner disregarded directions not to scale the final exam which had been given orally at the beginning of the year and repeated to him in June. Although petitioner complied with the order to unscale the exam, this does not diminish the fact that he disregarded the school policy as to scaling which was communicated to him. While his motives may have been to compensate for clerical errors by giving credit to students,

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the fact remains that he conducted himself in an insubordinate manner, and I so **CONCLUDE.**

Petitioner is also accused of giving his class actual questions from the final exam, without identifying them as such. He does not dispute that this occurred, but defends it as a legitimate test review procedure. The Board offered no express written or verbal policy on this point. Notwithstanding, it is apparent that this conduct inherently tended to undermine the integrity of the testing process. As such, I **CONCLUDE** that it was reasonable for the Board to consider this aspect in deciding to withhold petitioner's increment. It is also evident that there was inefficiency on the part of petitioner in the preparation of the final exam, which contained a number of blatant spelling errors and other omissions. While these errors may have not been his fault, the ultimate responsibility for the exam rested with him and the Board was not unreasonable in considering his performance to be inefficient or otherwise deficient in this regard. This was an English test in which such words as "literature" were mispelled.

As to the content of the exam, the Board's evidence is less convincing and the facts indicate that the petitioner did submit the exam for final review by his superior. It is also not disputed that the petitioner conducted a minimum number of review days in anticipation of the final and that his showing of the movie On Golden Pond came in the waning hours of the school year after review had been completed. As to petitioner's failure to use numerical averages until requested, the evidence did not show that this was clearly a articulated Board policy and, further, the petitioner complied with this request promptly when he was directed to provide numerical averages.

Because of petitioner's insubordinate conduct with respect to scaling, his questionable use of actual exam questions in review and inefficient preparation of the final exam, I **CONCLUDE** that the action of the Board of Education in withholding his annual increment for inefficiency or other good cause was not arbitrary and had a reasonable basis in facts and should be affirmed.

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ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** the action of the South Plainfield Board of Education in withholding petitioner's salary increment for the 1986-87 school year be **AFFIRMED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 16, 1988
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

6/17/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

23 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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ANTHONY FIORELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner contends that the ALJ made a number of legal and factual findings not supported by the record, the first of which relates to the ALJ's finding that he disregarded directions not to scale the final exam which was given orally at the beginning of the year and repeated to him in June. (Initial Decision, at p. 7) As to this, petitioner avers the ALJ ignored his unrebutted testimony that he was not in attendance at departmental meetings in the beginning of the school year because he was coaching and that the supervisor had never subsequently advised him of the "no scaling rule" at any time during the school year. He likewise contends the ALJ glossed over his unrebutted testimony that he believed the supervisor's June 16th statement not to scale the grades was a "comment" not a "directive," thus, he could comply with or ignore, the "comment" depending on the exigencies of the situation. Moreover, petitioner argues that (1) grading policies must be adopted by boards of education; (2) they should be in writing; and (3) they must be uniformly and consistently applied. He cites in support of this the following statement from Talarsky and Edison Education Assoc. v. Edison Twp. Bd. of Ed. et al., 1977 S.L.D. 862:

> The Commissioner hastens, however, to caution that local boards must by law make rules and regulations for governmental management of their schools. N.J.S.A. 18A:11-1 Accordingly, he directs the Board, and any board of education which has not recently reviewed its grading policies, to do so forthwith and to reduce to writing those important procedural elements upon which they rely to implement this evaluative facet of pupils' educational progress. (at 871)

Petitioner characterizes as erroneous the ALJ's finding and conclusion that the Board acted reasonably when it took into consideration his use of actual examination questions during the review he conducted albeit without identifying them as exam

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questions. (Initial Decision, ante) Petitioner maintains that he testified without rebuttal that he used a single question and asserts that the integrity of the exam could not have been placed in jeopardy by the use of only a single question.

Petitioner takes strong exception to the ALJ's determination that the Board acted reasonably when it took into consideration the spelling errors and other omissions on the exam, averring that as a member of an examination committee he cannot be held solely responsible. He cites in support of this a portion of his rebuttal to his evaluation (J-1) which attributes blame for the errors on the administration and relates that he corrected the errors verbally during the exam review and on the exam day by placing the corrections on the board. Moreover, petitioner points out that at the hearing he amplified on his rebuttal statement by testifying he was not given the actual exam questions from the office until the second week of June when it was too late to have the erroneous pages retyped.

Upon review of the record in this matter, the Commissioner is in agreement with the ALJ that petitioner has not borne his burden of proof that the Board acted arbitrarily or unreasonably when determining to withhold petitioner's salary increment. He finds unpersuasive petitioner's argument that the ALJ erred with respect to his finding and conclusion that the Board acted reasonably when considering the scaling issue. The Commissioner has not been provided a transcript in this matter; therefore, he is unable to read petitioner's testimony about not being present at department meetings early in the school year due to coaching. Even granting that this is true as stated, it is clear that in June he was informed by his supervisor not to scale the exam grades. It is meritless for petitioner to argue he thought he could scale because he believed his supervisor's statement to him not to scale was something he could chose to ignore since he perceived the statement to be a "comment" as opposed to a "directive." When a supervisor says not to scale an exam, the meaning is plan and unambiguous; for petitioner to argue otherwise is frivolous.

The Commissioner is likewise unpersuaded that the ALJ's determination should be reversed because there was no written policy with respect to the "no scaling" rule. While petitioner is correct that in Talarsky, supra, the Commissioner directed that boards of education reduce to writing those important procedural elements upon which they rely to evaluate pupil progress, that decision also cites the following passage from Gebhart v. Hopewell Twp. Bd. of Ed., 1938 S.L.D. 570 (1927), aff'd State Board of Education 576 (1928) which reads:

> ***The power to make rules does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal

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> vote. *** No system of rules however carefully prepared can provide for every possible emergency or meet every requirement. In consequence much must necessarily be left to the individual members of the school board, and to the superintendents of and the teachers in the several schools. It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.*** (at 573)

This passage makes it clear that reasonable rules and regulations developed by school officials do not all have to be reduced to writing. See also Saultz et al. v. Bd. of Ed. of Green Brook et al., decided by the Commissioner June 6, 1979. Thus, the absence of a written policy does not absolve petitioner from his having acted contrary to what he was told by his supervisor with respect to scaling.

Clearly, it would have been beneficial in this matter if a written policy existed and the Commissioner urges the Board herein to settle this issue of scaling in South Plainfield through written policy as this is the second case involving scaling to come before him recently. As stated in Talarsky, supra, unwritten policies/rules predispose a district to costly lawsuits since they are more difficult, within the given context of a dispute, to interpret than written ones (at 869).

As to the issue of using examination questions for review, even if the number were limited to only one, this does not make it unreasonable that the Board considered such a factor in its decision to withhold. In the Commissioner's judgment, it is clearly unacceptable for any actual exam question to be used during a review for the test and to argue otherwise is spurious.

Further, the Commissioner cannot agree that the ALJ erred when finding it reasonable for the Board to consider the spelling errors and other omissions on the test administered to the students. While the errors themselves may not have been caused by petitioner, final responsibility for the exam did in fact rest with him. Apparently the means he selected to correct for the errors were insufficient if he had to resort to scaling to compensate for those clerical errors as he avers.

Accordingly, the Commissioner adopts the recommended decision dismissing the Petition of Appeal as the final decision in this matter.

COMMISSIONER OF EDUCATION

July 27, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5163-87

AGENCY DKT. NO. 192-6/87

MATAWAN REGIONAL TEACHERS ASSOCIATION, MARIE PANOS, CARL KOSMYNA, JOHN SHAW, JOHN MISIELLO, PATRICIA MATTERN, RICHARD HOLER AND JOHN MC KENNA,

Petitioners,

v.

MATAWAN/ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, JERROLD SCHERAGA, SUZANNE SCHERAGA, DANBE CORPORATION, A CORPORATION OF THE STATE OF NEW JERSEY, TRADING AS VIDEO PLUS: AND FRAME-BY-FRAME VIDEO SERVICES, INCORPORATED,

Respondents.

Mark Blunda, Esq., for petitioners (Oxfeld, Cohen, Blunda, Fredman, LeVine & Brooks, attorneys)

Malachi J. Kenney, Esq., appearing for respondents, **Michael J. Gross**, Esq., on the brief (Kenney & Kenney, attorneys)

Record Closed: March 28, 1988

Decided: June 16, 1988*

*Extension Granted

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BEFORE DANIEL B. MC KEOWN, ALJ:

The issue presented in this case is whether a board of education has discretionary authority to pay legal fees in a private matter in which one of its members is a plaintiff who asserts the private action arose from her official duties as a board of education member. The Mataway/Aberdeen Regional School District Board of Education (Board) authorized the payment of such fees to plaintiffs in the civil action entitled Jerrold Scheraga and Suzanne Scheraga, husband and wife; Danbe Corp. a corporation of the State of New Jersey, t/a Video Plus; and Frame-By-Frame Video Services, Inc. v. Mataway Regional Teachers Association; Marie Panos, Carl Kosmyna, John Shaw, John Misiello, Patricia Mattern, Richard Holer, John McKenna, all officers and members of the Mataway Regional Teachers Association, individually and as a class which was filed in New Jersey Superior Court, Law Division. Suzanne Scheraga is a member of the Board and is an officer and employee of the Danbe Corporation. She is a director, secretary and 50 percent shareholder of Frame-By-Frame Video Services, Inc.

On or about June 19, 1987 the Matawan Regional Teachers Association and seven of its members, petitioners in this case, filed a Petition of Appeal before the Commissioner of Education challenging the Board's action in paying legal fees to the referenced plaintiffs. The Board filed its answer on or about July 24, 1987. On July 28, 1987 the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted September 1, 1987 as scheduled by the Newark office of the Office of Administrative Law. Thereafter, the matter was placed on the inactive list November 24, 1987 from which it was removed on or about February 4, 1988. Thereafter, the parties agreed the matter should be decided on cross motions for summary decision. The record on the cross motions for summary decision closed on or about March 28, 1988. Thereafter, an extension of time to issue this initial decision was granted. The record consists of the pleadings, affidavits, a certification, answers to certain interrogatories, exhibits, and briefs of the parties.

BACKGROUND FACTS

The background facts of the matter as established by the pleadings, affidavits, and exhibits are these. In and about March 1987, negotiations were occurring between the Board and the Association. Board member Suzanne Scheraga participated in the

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negotiations. According to Ms. Scheraga's affidavit she attests that at about 2:30 p.m. on March 19, 1987 representatives of the Association organized and conducted picket lines outside her business premises located at the Strathmore Shopping Center in Aberdeen, New Jersey. Ms. Scheraga's business premises she identifies as the Danbe Corporation and Frame-By-Frame Video Services, Inc. Elsewhere in her affidavit, Ms. Scheraga attests as follows:

> 4. These picketers held signs and shouted statements pertaining to the Mataway/Aberdeen District Board of Education contract and budget disputes.
>
> 5. Some signs read:
>
> "Teachers Want a Contract Now"
>
> "Avoid a Video Replay - Matawan/Aberdeen Strikes - Settle Fairly Now"
>
> "Save Our Schools"
>
> "Be a Board of Education Not a Board of Distruction"

Ms. Scheraga attests that she perceived the picketing of her business premises to be the direct result of her position on negotiation issues as a Board member.

Bruce Quinn, the Board secretary, attests in an affidavit filed that he was instructed by the Board president identified as Irving Hurwitz to poll Board members in order to authorize legal proceedings on behalf of Ms. Scheraga to restrain the Association's picketing which commenced March 19, 1987. As the result of that polling, Mr. Quinn attests that he authorized labor counsel, counsel of record here, to take the necessary steps to restrain the Association from continuing the picketing of Ms. Scheraga's business premises. According to Mr. Quinn, the "polling" was affirmed and memorialized by the entire Board at its next scheduled meeting which was conducted March 23, 1987. Exhibit A attached to Mr. Quinn's affidavit is what porports to be

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minutes of the executive session conducted. The minutes reflect that the Board members who were present agreed that the Board should defend the "rights of individual Board members when their actions were attacked by the [Association], or other groups***".

Nevertheless, on March 20, 1987 the private action was filed in Monmouth County New Jersey Superior Court, Chancery Division, by Jerrold and Suzanne Scheraga, Danbe Corporation, and Frame-By-Frame Video Services. A verified complaint was filed, along with an order to show cause with temporary restraints by which the Scheragas sought relief against the Association. The Honorable Patrick J. McGann, Jr., JSC, issued an order in which he found that illegal economic duress is and probably will continue causing immediate, substantial and irreparable harm to plaintiffs from the picketing and enjoined the Association and its members from further picketing or interferring with or obstructing ingress or egress to the Scheraga's business property. Judge McGann continued the restraints on March 30, 1987 pending a final hearing.

On May 5, 1987, the plaintiffs Scheraga filed a damage demand with the Association for the amount of $50,000. On May 27, 1987 Judge McGann issued an order acknowledging that the equitible injunctive relief became moot and that the remaining claims are for money damages, compensatory and punitive, based on the alleged tortious conduct set forth in the Verified Complaint. Therefore, Judge McGann transferred the case to the Law Division of New Jersey Superior Court, Monmouth County. It appears that sometime thereafter the parties, plaintiffs Scheragas and defendant Association, entered a stipulation of dismissal.

Between March through May 1987, labor counsel for the Board billed it $4,340 for work performed on behalf of plaintiffs Scheraga. Jerrold Scheraga is the registered agent, a director, president, and a 50 percent shareholder of both Danbe Corporation and Frame-By-Frame Video Services, Inc. He is also a supervisory employee with Danbe. Neither corporation has any direct business connection with the Board. Both corporations operate from the same premises at the Strathmore Shopping Center, in Matawan. Both corporations do business as Video Plus. Jerrold Scheraga is the husband of Suzanne Scheraga.

This concludes a recitation of the background facts of the matter.

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ARGUMENTS OF COUNSEL

Petitioners contend that N.J.S.A. 18A:12-20 provides only that a board shall defray the costs of defending a civil or criminal action brought against a Board member acting in the performance of his or her duties. Petitioners point out that in this case, the action filed by the Scheragas against the Association was an action for damages by two individuals against the Association. One happened to be a Board member but that happenstance does not justify, in petitioner's view, the expenditure of public funds by the Board to underwrite Scheragas' legal expenses incurred in filing the civil action against the Association. Simply stated, petitioners explain, the Superior Court civil action was not an action against a Board member. Petitioners rely upon Famette v. Board of Education of Borough of Wood-Ridge, 1964 SLD 42 for the proposition that the Board is without authority, express or implied, to expend public funds to reimburse either Jerrold or Suzanne Scheraga for their legal fees and expenses as plaintiffs. Moreover, petitioners point to Hogan, et al v. Kearney Board of Ed., 1982 SLD 329, 348 aff'd 1982 SLD 354, where the holding of Famette was relied upon by the Commissioner for the very same principle.

The Board acknowledges that N.J.S.A. 18A:-12-20 obligates a board of education to bear the costs of litigation including counsel fees when actions have been brought against individual members of the board but that in this case the mandatory application of the statute is unnecessary. The Board reasons that it has discretion to underwrite legal fees incurred by any of its members resulting from the performance of duties as a Board member. The Board contends that the legislative intent and public policy interests in this matter must be to insullate Board members from incurring legal fees resulting from their actions in the performance of their duties and relies in this regard upon Kulish v. Hillside Policemen's Benelovent Assn., 124 N.J. Super. 263 (Chan. Div. 1973). The Board distinguishes Kulish from those cases where the commissioner held boards of education of a statutory obligation only to pay legal fees of board members where they are defendants, not plaintiffs. Finally, the Board contends that the Association indirectly attacked Board member Scheraga by picketing her business premises solely because of her position on school budget matters. Accordingly, the Board claims because Board member Scheraga was indirectly attacked by the Association it had the discretionary authority to determine to underwrite her legal fees in order to protect her economic interests as the result of the offensive launched against her by the Association.

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LAW AND CONCLUSION

N.J.S.A. 18A:12-20 provides in full as follows:

> Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

The statute is clear and unambiguous. It obligates a board of education to "*** defray all costs of defending such action, including reasonable counsel fees and expenses***" whenever a civil or criminal action has been or shall be brought against any board member and, in the latter case, when the criminal action is dismissed against such person. There is no authority for a board of education to use discretion and elect which case to indemnify a board member who is a named defendant in a legal proceeding; it must indemnify in such a case. There is either mandatory nor discretionary authority, however, for a board of education to underwrite legal fees when a board member becomes a plaintiff.

Kulish v. Hillside Policemen's Benevolent Assoc. is distinguishable from this case. There, Kulish, a member of the township committee of Hillside, and four other committee persons sought to enjoin the police association from picketing their places of employment. They file an action aginst the association individually and as member of the township committee of Hillside. While not an issue in the case, a certification of James C. Welsh as filed by the Board notes that he was special township attorney representing the committee persons in the Kulish matter. The township committee retained his services to represent those members who sought and secured injunctive relief. Mr. Welsh's legal services, he certifies, were fully endorsed and paid for by the township of Hillside. In this case, the Scheragas instituted a purely private action in which they sought not only injunctive relief by compensatory and punitive damages. It is too late in

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the day for the Scheragas to now say that that action was instituted solely to allow Ms. Scheraga to function in her duties as a board member. If that were so, Ms. Scheraga could have approached the Board and the Board should have exercised its authority under N.J.S.A. 18A:11-2 to sue for injunctive relief in its name and in the name of Board member Scheraga. Clearly, that did not occur.

Famette v. Board of Education of the Borough of Wood-Ridge, 1964 SLD 42 denied reimbursement to four board members on the ground their action served no public purpose and was personal and private. The same ruling applied to the board member who was the defendant in that action. The Hogan matter drew a sharper line and holds that a board of education is without authority, either express or implied, to expend public funds to reimburse present or former board members for their legal fees and expenses as plaintiffs. In the present case, Suzanne Scheraga is a plaintiff in the purely private action. Other named plaintiffs are her husband, who has no relationship to the Board; Danbe Corporation, which has no relationship with the Board; and, Frame-By-Frame Video Services, Inc. which has no relationship whatever with the Board. Suzanne Scheraga was acting in her private capacity as an officer of the corporations, in conjunction with her husband, in order to seek relief for what they perceived to be economic harm being visited upon their business enterprises.

Even if the Board secretary received an affirmative vote from his private "polling" of Board members on March 19 to underwrite Suzanne Scheraga's legal fees in this case, and even if the Board ratified such private polling at an executive session on March 23, 1987, and even if such action had legal efficacy, the conclusion remains that a board of education is without discretionary authority to underwrite legal expenses for board members when those board members are plaintiffs in a purely private action and the subject matter of the private action is not of public concern.

For the foregoing reasons, the Board of Education is prohibited from utilizing public funds to underwrite a civil damage action against the Association by respondents Jerrold Scheraga, Suzanne Scheraga, Danbe Corporation, and Frame-By-Frame Video Services, Inc. Jerrold Scheraga, Suzanne Scheraga, Danbe Corporation and Frame-By-Frame Video Services, Inc. are obligated, jointly and severally, to immediately reimburse the Mataway/Aberdeen Regional School District Board of Education for all monies expended on their behalf in connection with the prosecution of their civil damage action in New Jersey Superior Court, Monmouth County.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 16, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

June 16, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 21 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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MATAWAN REGIONAL TEACHERS ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondents filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioners' reply exceptions were untimely, however.

Respondents posit four exceptions. They are summarized in pertinent part below.

> I. THE INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE BELOW INCORPORATES AN ERRONEOUSLY NARROW INTERPRETATION OF THE APPLICABLE STATUTES AND DECISIONAL LAW, ERRONEOUSLY CONSTRUES THE UNDERLYING FACTS AND SO ELEVATES FORM OVER SUBSTANCE AS TO REACH A CONCLUSION INCONSISTENT WITH APPLICABLE PUBLIC POLICY.
>
> ***
>
> 1. The Statute Is Permissive And Does Not, By Its Express Terms, Prohibit Respondent/Board From Underwriting The Legal Fees Of A Board Member In The Circumstances Presented.
> (Exceptions, at pp. 9, 11)

Respondents contend the ALJ's conclusion that there is neither mandatory nor discretionary authority conveyed by N.J.S.A. 18A:12-20 for a Board of Education to underwrite legal fees when a Board member becomes a plaintiff is in error. Relying on N.J.S.A. 18A:11-1, which defines board powers in general, respondents contend that "[b]y stating that the statutory provision of N.J.S.A. 18A:12-20 prohibits the Board of Education from providing funds to support members of the Board of Education for activities directly related to their membership [on] the Board, severely limits the powers of the Board of Education under the general provisions of N.J.S.A. 18A:11-1." (Id., at p. 12) Respondents further argue that

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so long as the Board does not use the general powers conferred by N.J.S.A. 18A:11-1 arbitrarily, capriciously or in a discriminatory manner, it is "fully possessed with the discretionary authority to undertake this action, so long as there is no prohibition under New Jersey Statutes or Administrative codes prohibiting such action." (Id., at pp. 12-13)

2. The Administrative Law Judge's Emphasis On The Fact That The Individual Board Member Was A Plaintiff In The Underlying Litigation Ignores The Central Reality That The Litigation Was Initiated to Protect And Defend The Board Member Against Improper And Harmful Conduct Taken Against Her Solely Because Of Her Official Actions As A Member Of The Board of Education. (Id., at p. 13)

Respondents argue that the ALJ's decision suggests that only those cases which can be "neatly applied to the statute are worthy of Board reimbursement. This conclusion ignores the factual background which existed in this case, including the unlawful and harmful picketing which was undertaken by the Association against the Board member's family owned business in direct retailiation (sic) for the Board member's position on the budget and negotiation issues." (Id.)

Relying on Harvey v. Bd. of Ed. of the Twp. of Brick et al., 1971 S.L.D. 144, respondents contend the action of the Matawan Regional Teachers Association (hereinafter MRTA) prompted the Scheragas, with approval of the Board, to file a complaint to enjoin its picketing. Respondents contend in Harvey the Commissioner concluded that counsel fees were reimbursable because "the actions 'while not "brought against" the person directly [were] brought in a manner that may be considered to be brought against his interests by indirection', [Harvey, at p. 150]." (Id., at p. 14) Respondents contend that to allow the "indirect" attack of the MRTA to be financed by individual Board members would deter others from seeking to partake in public service if they believe they would be subjected to such activity and be forced to finance their relief from these types of actions.

3. The Reported Cases Do Not Prohibit The Use Of Public Funds To Pay A Board Member's Legal Fees In A Case Of This Type. (Id., at p. 15)

Respondents would distinguish the two cases upon which the ALJ relied, that is Famette v. Bd. of Ed. of Wood-Ridge, 1964 S.L.D. 42 and Hogan et al. v. Kearny Bd. of Ed., 1982 S.L.D. 329, aff'd State Board 356. Summarizing the position they proffered at hearing, respondents contend in exceptions, "Here there is no question that the action brought by the Scheragas with the blessing of the Board was not undertaken out of private desires but rather

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from the public activity of the MRTA in picketing the business as a result of the Scheragas public positions." (Id., at p. 16)

C. The Administrative Law Judge Based His Decision On Incorrect Findings of Fact. (Id., at p. 17)

Respondents aver that the ALJ erred in concluding that the injunctive relief sought by the plaintiffs was "a purely private action and the subject matter of the private action is not of public concern." (Id., at p. 17, quoting Initial Decision, ante) They contend that for the ALJ to conclude that the inclusion of monetary damages in a complaint accompanied with a request for injunctive relief transforms an action into a totally private action is unjustifiable in this particular instance. Moreover, respondents aver the ALJ's finding of fact was incorrect in stating that if the Scheragas had approached the Board of Education, and the Board had exercised its authority to sue for injunctive relief in its name and in the name of Board Member Scheraga, then the Board would be empowered to finance the litigation. They contend:

> The Board of Education, after learning of the picketing in front of the business premises of the Scheragas, was polled by its Board Secretary at the instruction of the Board President to endorse and financially support through the use of the Board Labor Counsel, an action for injunctive relief. Therefore the facts are not in dispute that the Board of Education initiated the action to seek injunctive relief, and the Scheragas did not undertake the injunctive relief and subsequently seek Board support for their actions. This critical factual determination by the Administrative Law Judge was in error. (Id., at p. 19)

Moreover, respondents avow:

D. The Decision Of The Administrative Law Judge Is Inconsistent With The Clearly Established Principle Of Public Policy That Unpaid Volunteer Members Of Local Boards of Education Should Not Be Burdened By The Need To Expend Personal Funds For The Cost of Litigation Arising Out Of Their Duties As Board Members When Those Costs Are Incurred Solely To Protect Them From Direct Personal Harm. (Id., at p. 20)

Respondents argue that to hold that the public policy in Famette, supra, and Houston v. Bd. of Ed. of No. Haledon, 1959-60 S.L.D. 73, aff'd State Board 1960-61 S.L.D. 232 does not apply to this case since the matter was initiated by the Board members as the

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direct result of the picketing and other concerted activity against Scheraga's family-owned business is placing form over substance. Moreover, respondents allege that:

> To permit the Administrative Law Judge's decision to be affirmed, would be an invitation to continual and more intensified harassment and concerted activity against the poorest and most economically vulnerable Board members, since those individuals would not have the resources to personally finance litigation to stop the activities of the Association. The Association could strategically choose which Board member would be less able to privately finance litigation and, as a result, continue their illegal actions indefinitely without being subject to court involvement. (Id., at p. 22)

Respondents rely on Kulish v. Hillside Police Benevolent Assn., 124 N.J. Super. 263 (Ch. Div. 1973), and claim this case was the basis upon which Judge McGann issued the temporary restraining order against the picketers in this matter.

> II. THE ADMINISTRATIVE LAW JUDGE ERRED IN GRANTING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT BY PLACING CRUCIAL EMPHASIS ON THE TECHNICALITIES OF THE PLEADINGS IN THE UNDERLYING CIVIL LITIGATION WHEN POSSESSED OF FULL KNOWLEDGE THAT A HEARING IN THE CASE WOULD PROVIDE RELEVANT TESTIMONY CONCERNING THOSE TECHNICAL QUESTIONS. (Id., at p. 24)

Respondents' counsel submits again the letter of November 13, 1987 he wrote to ALJ McKeown setting forth an elaborate recitation of the tactical decisions required in appearing before Superior Court Judge McGann in his successful attempt to enjoin the picketing in front of the business of Board member Scheraga's husband. Counsel for respondents admits the proffered testimony was not part of the official record of the case before ALJ McKeown on summary judgment and, thus, recognizes that it was not considered by the ALJ. Counsel contends it should have been.

Citing Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954) for the proposition that summary judgment should not be granted unless the moving party establishes that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law, respondents contend in the instant matter the ALJ drew every inference favorable to the moving party rather than as required in favor of them. "The [ALJ] did so despite having full knowledge *** that a full hearing would present factual testimony which rebutted each and every one of those inferences." (Exceptions, at

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pp. 26-27) Counsel contends the ALJ should have conducted a full hearing to consider all the relevant facts related to the following alleged facts:

> The profferred (sic) testimony [in respondents' counsel's letter of November 13, 1987] established that this office was directed by the Board of Education, informally due to the emergent circumstances, to represent Respondent Scheraga in legal proceedings to seek injunctive relief against the picketing at her husband's place of business. The profferred (sic) testimony also sets forth the fact that the decision to name Respondent Scheraga's husband and corporations was made not by Respondent Scheraga but by counsel in an effort to assure full satisfaction of the court's standing requirements. Similarly, the profferred (sic) testimony establishes that the decision to seek monetary damages was made by counsel rather than Respondent Scheraga in an effort to satisfy the judicial requirement for injunctive relief that actual damages from the challenged conduct existed. (Id., at p. 25)

Respondents seek to have the ALJ's decision vacated and remanded for full hearing in the event that it is not reversed for the reasons set forth in Point I of their exceptions.

Upon his careful and independent review of the record before him, the Commissioner affirms the initial decision for the reasons expressed therein. He adds the following.

No matter which way the record is reviewed, either with or without respondents' counsel's letter to the ALJ dated November 13, 1987, it is unrefuted that Ms. Scheraga did not seek injunctive relief in court in her capacity as a Board member. Rather, along with her husband and another stockholder in their business, Board member Scheraga sought injunctive relief to protect their private business interests, not those of the public whom she represented as a Board member. Neither was the Board a party to that action. Notwithstanding the Board's action agreeing in advance to underwrite the legal costs of such Superior Court action, no authority in law exists permitting the Matawan-Aberdeen Regional School District Board of Education to expend taxpayers' money to underwrite a private civil damage action filed by private individuals or corporations. See Hogan et al., supra. (Except for indemnification for the costs of defending board employees or office holders pursuant to N.J.S.A. 18A:16-6, there is no statutory authority for the award of counsel fees for cases arising under school laws.)

Only two exceptions have been carved from this general rule. Recently, the Appellate Court overturned the State Board and

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the Commissioner in E.B., an infant by her parent and guardian ad litem, A.B. v. Board of Education of the North Hunterdon Regional School District et al., decided by the Commissioner August 22, 1985 and May 1, 1986, aff'd State Board September 3, 1986, rev/rem. 225 N.J. Super. 221 (App. Div. 1988). The court allowed the award of counsel fees in that matter which arose under joint jurisdiction of the Commissioner of Education pursuant to N.J.S.A. 18A:6-9 and also under the Division on Civil Rights and the Law Against Discrimination pursuant to N.J.S.A. 10:5-27.1. The court held that, in such a situation, choice of forum should not prevent the award of counsel fees where one forum, pursuant to N.J.S.A. 10:5-27.1, permits the award of counsel fees while the other forum, pursuant to N.J.S.A. 18A:6-9, does not. That situation does not prevail under the instant facts.

The other exception carved out by the Commissioner of Education was in the case entitled Ross v. Board of Education of the City of Jersey City, 1981 S.L.D. 307, aff'd State Board 320. That case involved a conflict between a district superintendent and a local board over appointment authority and was initiated by a superintendent, not a board member. However, in Daniel Gibson, Jr. v. Board of Education of the City of Newark, Essex County, decided by the Commissioner March 30, 1984, dis. State Board June 6, 1984, Superior Court rev/rem to State Board October 18, 1985, State Board aff'd with modification, May 6, 1986, Superior Court aff'd November 15, 1986, the State Board limited the holding in Ross to its particular facts and denied counsel fees in the Gibson case, reversing the Commissioner's grant of such fees. In the latter case, the Commissioner's basis for such award was that Gibson, as a board member, petitioned the Commissioner in order to force the board to comply with "'statutory prescription with regard to the concept of unit control and organization pursuant to the enacted provision of N.J.S.A. 18A:17A-1 et seq.' (Gibson I, at 43)" Gibson, State Board decision dated May 6, 1986, at pp. 29-30. Limiting Ross to its facts, the State Board stated in Gibson:

> Although Ross involved issues similar to those in the instant case, i.e., conflicts between a district superintendent and a local board over appointment authority, the case was initiated by a superintendent, not by a board member. Although that fact is not controlling, the State Board believes that the ruling in that case is best restricted to its particular facts. We believe that the possibility of attorney fees in similar cases might encourage litigation in the future between boards and their members over issues of far less merit than those presented here.
>
> In Hogan v. Bd. of Ed. of the Town of Kearny, decided by the State Board, August 4, 1982, the State Board found that, except for

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indemnification for the costs of defending board employees or office holders pursuant to N.J.S.A. 18A:16-6, there is no statutory authority for the award of counsel fees for cases arising under the school laws. The State Board added:

> Furthermore, to the extent that Petitioners desire to have alleged violations investigated and pursued, avenues other than private lawsuits brought by them were available such as referral of the alleged violations to the State Department of Education, the Attorney General's Office or other law enforcement agencies.

Id. at 1.

We follow that rule in our decision today, and reverse the Commissioner's award of counsel fees to the successful litigant below.[8]

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[8] We have been advised that the Newark Board has paid the legal fees awarded by the Commissioner's decision in this controversy. Given the unique circumstances of this case, our holding on this issue is to be applied prospectively and not to fees already paid. (emphasis in text) (Slip Opinion, at p. 30)

Accordingly, the Commissioner finds in the instant matter, as did the ALJ below, no basis for the awarding of counsel fees. Summary decision is granted in favor of petitioners and is denied respondents, for the reasons expressed in the decision of the Office of Administrative Law as amplified herein. Consequently, the Board of Education is prohibited from using public funds to underwrite a civil damage action against the Association by Respondents Jerrold Scheraga, Suzanne Scheraga, Danbe Corporation and Frame-By-Frame Video Services, Inc.

Respondents are hereby ordered to immediately reimburse the Matawan-Aberdeen Regional School District Board of Education for all monies expended on their behalf in connection with the prosecution of their civil damage action in New Jersey Superior Court, Monmouth County.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 28, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5721-87
AGENCY DKT. NO. 261-8/87

PHYLLIS LOEWENGART,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,
Respondent.

Stephen B. Hunter, Esq., for the petitioner (Klausner, Hunter and Oxfeld, attorneys)

David B. Rand, Esq., for the respondent (Rand, Algeier, Tosti, Woodruff and Frieze, attorneys)

Record Closed: May 6, 1988 Decided: June 20, 1988

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

PROCEDURAL HISTORY

This matter concerns the petition filed with the Commissioner of Education (Commissioner) by the petitioner, Phyllis Loewengart. This petition alleges that the Board of Education of the Township of Randolph, Morris County (Board) acted arbitrarily and unreasonably, and in violation of N.J.S.A. 18A:29-14, when it denied Ms. Loewengart a salary increment and adjustment for the 1987-88 school year. The Board denied the allegation. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 52:14F-1 et seq.

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Administrative Law Judge Philip P. Cummis held the prehearing conference, by way of a telephone conference call, on October 15, 1987. At that time, the parties agreed that the issues in this matter are:

1. Whether the petitioner, a tenured teacher employed by the Board, had her increment for the 1987-88 school year illegally, arbitrarily and capriciously withheld.

2. Whether the withholding of the increment was unfounded, in bad faith and in contravention of the provisions of N.J.S.A. 18A:29-14.

3. Whether an order should be entered directing that any adjustments and/or longevity increments withheld from the 1987-88 school year be restored with appropriate interest retroactive to the start of the 1987-88 school year.

4. Whether the petitioner's records relating to the Board's action withholding her increment should be expunged.

5. Whether the Commissioner should grant any and all other relief as he deems just and proper.

After Judge Cummis issued the prehearing order on October 20, 1987, Stephen B. Hunter, Esq., on behalf the the petitioner, requested first Judge Cummis and then Administrative Law Judge James A. Ospenson to recuse themselves in order to avoid the appearance of impropriety. Both judges assented to his request. The matter was then transferred to the undersigned for purposes of hearing the matter and rendering an initial decision.

The hearing took place on January 19, 20, 1988, in the Office of Administrative Law in Newark, New Jersey. After receipt of briefs, the record in this matter closed on May 6, 1988.

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FACTUAL FINDINGS

I FIND that the facts in this matter are not in dispute.

Ms. Loewengart holds a certification as an elementary school teacher, grades kindergarten through eighth grade, and she has been employed by the Board since the 1979-1980 school year (1T27-28).[1] From her initial appointment through the 1983-1984 school year, the petitioner was employed as a Title 1 teacher at the Ironia Elementary School (1T28). As a Title 1 instructor, the petitioner received satisfactory evaluations and she was complimented by her supervisors for her quiet and unobstrusive manner, for her ability to interact well with her students, for her patient and thorough instruction style and for her hard work (P-1, P-2, P-3, P-4, P-5, P-6).

For the 1984-1985 school year, the petitioner was employed as a full time second grade teacher at the Ironia Elementary School (1T28). As a second grade instructor, Ms. Loewengart also received satisfactory evaluations, however, her supervisors noted the need for improvement specifically in the category of lesson presentation and development (P-7, P-8, P-9, P-10). In the 1985-1986 school year, the petitioner taught fifth grade, language arts and mathematics a basic skills instructor and for one hour a day, five days a week, she was a kindergarten assistant instructor at the Ironia Elementary School (1T28, 33). Ms. Loewengart received satisfactory evaluations of her work performance for the 1985-1986 school year (P-11, P-12), and was specifically commended by the principal for her work in preparing for the colonial day program (P-14).

At the end of the 1985-1986 school year, the petitioner was transferred to the Center Grove School (P-13). During the 1986-1987 school year, the petitioner worked primarily as a basic skill instructor; however, for one hour a day, five days a week, she was a kindergarten assistant (1T35). When the petitioner was in the kindergarten class, the students were split into two groups based on their performance in language arts (1T38). Each group had approximately ten students and was taught by either Barbara Farver, the regular teacher for the class or Ms. Loewengart, on a rotating basis (1T38-9).

On December 15, 1986, Ms. Loewengart was observed, in the kindergarten class, by Edward J. Geueke, the principal of the school (1T42). In his written evaluation,

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[1] Transcript, January 19, 1988, (1T)

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Mr. Geueke rated the petitioner's performance as generally satisfactory; however, he felt that there was need for improvement in the category of lesson presentation and development and that Ms. Loewengart had to put more enthusiasm into her teaching to stimulate the students and to keep them interested in the lesson (P-16). At the hearing, Mr. Geueke testified that he was not criticizing Ms. Loewnegart's "low key style" but the fact that she failed to motivate her students (2T110).[2] Mr. Geueke stated that it is not necessary for teachers to be loud or aggressive and that teachers can be soft spoken and still be dynamic in their ability to motivate students (2T118). Mr. Geueke recommended that the petitioner read a specific booklet, use more visual aids, observe other instructors and video tape her own lessons (P-16, 2T80-88).

Ms. Loewengart did not file a response to this evaluation, and she followed Mr. Geueke's suggestions and tried to improve her teaching style (1T 49-51). At the hearing, Ms. Loewengart noted that Mr. Geueke was not critical of her lesson plan (P-15), and that she considered the evaluation report (P-16), to be generally complimentary of her work (1T84).

On January 30, 1987, Mr. Geueke again observed the petitioner in the kindergarten classroom. In his report, regarding this evaluation, Mr. Geueke was again critical of Ms. Loewngart's performance. Specifically, Mr. Geueke felt that she was not motivating the students and that she should have better control over the students (P-17A). At the hearing, Mr. Geueke testified that after giving pretzels as prizes, the petitioner lost control over the students and he had to intervene to establish order (2T93-94). In her written response to this evaluation, the petitioner stated that she had been teaching a difficult group of children including one pupil who has been referred to the child study team and another pupil who is now in a behavior modification program (P-17B). Ms. Loewengart felt that she and Mr. Geueke had a difference of opinion as to teaching style and that he had unfairly evaluated her performance based on his preference regarding style (P-17B). Shortly thereafter, the petitioner informed Mr. Geueke that she had observed other teachers and had video taped one of her own lessons (P-18). At the hearing, the petitioner reiterated these comments and indicated her willingness to follow Mr. Geueke's recommendations in order to improve (1T49-55).

---

[2] Transcript, January 20, 1988 (2T)

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Also, after the second evaluation, Mr. Geueke recommended another evaluator observe the petitioner's performance (2T102). Mary J. Donnelly, the assistant superintendent for curriculum and instruction was selected to do this evaluation by Robert Gordon, the Superintendent of Schools (1T143, 2T9-10).

On March 12, 1987, Ms. Donnelly observed the petitioner teaching the kindergarten class and concluded that although the petitioner used various techniques and activities during the lesson, it was an uncomfortable learning situation since the petitioner had not correctly assessed the students' learning level and the lesson failed to challenge all the students (P-20A). At the hearing, Ms. Donnelly stated that the petitioner's students became restless and fidgety since too much time was spent on one item and they could do more challenging work (2T13, 32-33). In her response to this evaluation, Ms. Loewengart noted that her lesson plan followed the curriculum and was coordinated with the kindergarten teacher (P-20B). Although Ms. Loewengart acknowledged that a number of the students appeared to know the subject matter, she felt it was necessary to continue the presentation by using a variety of activities, in order that there was a thorough understanding by all of the students (P-20B).

On the basis of his two observations and his discussion with Ms. Donnelly, Mr. Geueke recommended that Ms. Loewengart's annual increment be withheld for the 1987-1988 school year (P-21A, 2T104). In the annual evaluation, which he prepared on March 13, 1987, Mr. Geueke stated:

> Mrs. Phyllis Loewengart is conscientious, follows and implements recommendations, and is most willing to follow supervisory direction. Her positive attitude and sincere effort to attempt to improve is so noted. However, Mrs. Loewengart has had specific and notable difficulties in guiding and directing the conduct and behavior of kindergarten pupils. The evaluator recognizes that the instructor has had many years of experience, and also assumes that previous teaching experience should have groomed teaching performance to a a productive level.
>
> At this point in time following the customary classroom evaluations, it has been determined that Ms. Loewengart's instruction has not resulted in an appropriate level of pupil progress. In addition, many lessons have not been designed to challenge students at the correct level of difficulty; inefficiency and reduced effectiveness in the learning process is the outcome. [P-21A]

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In her response to this annual evaluation, Ms. Loewengart argued that Mr. Geueke's recommendation that her salary increments be withheld was unwarranted and unfair (P-21B). The petitioner noted that all the observations took place in the kindergarten class even though she spent 80 percent of her time as a basic skills teacher, and that she was not advised that Mr. Geueke was seriously concerned about her teaching methods nor was she given adequate guidance and time to improve (P-21B).

At the hearing, it was noted that Ms. Loewengart received a preliminary evaluation before she got the written evaluation from Ms. Donnelly. Ms. Loewengart did not have the required professional improvement plan (PIP) for the 1986-87 school year. However, Ms. Donnelly stated that the Board requires an annual professional growth objective rather than a PIP, and that a PIP is prepared only if there is a perceived deficiency (2T121-123).

After reviewing the recommendation of Mr. Geueke and the evaluation of Ms. Donnelly, Mr. Gordon recommended to the Board that the petitioner's salary increments be withheld.

Ms. Loewengart was given an opportunity to discuss the matter with the Board before it took any action (P-22). Thereafter, at a regular meeting, the Board voted to withhold the petitioner's annual increments pursuant to N.J.S.A. 18A:29-14 for the following reasons:

1. Deficiencies in lesson planning, presentation and development.
2. Failure to present lessons at appropriate skill level of the students.
3. Failure to adequately supervise and control student academic performance.
4. Poor classroom management. [P-23]

CONCLUSIONS OF LAW

It has been established by school case law that the awarding of an annual salary increment is not an automatic act, that the local board of education may withhold said increment for good cause, and that the burden of proof is on the teacher to show that

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the board acted in an unreasonable manner, Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). Further, school case law has established that the Commissioner should give deference to the discretion of the local school administrators and should only determine whether or not the local school administrators had a reasonable basis for their conclusion, Kopera at 296.

Having reviewed the extensive arguments presented by the parties, I CONCLUDE that the petitioner has not shown that the withholding of her increments for the 1987-1988 school year was illegal, arbitrary or capricious. Both Mr. Geueke and Ms. Donnelly concluded that the petitioner was not motivating her pupils and that her teaching style was detrimental to the students learning process. Although there was a great deal of attention given to Mr. Geueke's apparent preference for a dymanic teaching style, the important factor is not the type of the teaching style but whether it is effective in motivating the students to learn. Both Mr. Geueke and Ms. Donnelly observed students who were distracted and who were not fully involved in the lesson taught by Ms. Loewengart.

After his first observation on December 15, 1986, Mr. Geueke made a number of recommendations to Ms. Loewengart as to how she could improve her presentation. Since Ms. Loewengart is an experienced teacher, it is not unreasonable for Mr. Geueke to have expected that there would be some improvement when he again evaluated her in January 1987. Further, since the third evaluation did not take place until March 12, 1987, Ms. Loewengart had adequate time to improve her teaching presentation.

Although I recognize that Ms. Loewengart is primarily a basic skills teacher and that she has developed a style of teaching that is compatible with the needs of students in such courses, the Board has the right to assign her to be a part-time kindergarten assistant and to expect her to properly teach the kindergarten students. The fact that petitioner had developed a style of teaching which was successful with Title 1 students does not justify her using the same style when it was shown to be less effective with regular kindergarten students. Also, I recognize that Mr. Geueke has the discretion to conduct his evaluations of the petitioner's performance in the kindergarten class.

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DISPOSITION

Therefore, I **CONCLUDE** that the petitioner has not shown that there was no reasonable basis for the Board's decision to withhold her salary increment and adjustment for the 1986-1987 school year. Further, I **CONCLUDE** that the criticisms contained in the evaluation reports are good and sufficient reasons for the withholding of her increment and adjustments for the 1986-87 school year.

For these reasons, I **ORDER** that the Board's determination to withhold the petitioner's salary increment and adjustment for the 1986-1987 school year be **AFFIRMED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 20, 1988
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

6/20/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 23 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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PHYLLIS LOEWENGART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's first exception alleges that the ALJ failed to comply with N.J.A.C. 1:1-18.1 which requires the ALJ to (1) analyze the facts adduced at the hearing in relation to the applicable law and covering all issues of fact and law raised in the pleadings; (2) delineate findings of fact with regard to disputed factual issues; and (3) specify conclusions of law based upon the findings of fact. More specifically, she alleges the ALJ "simply failed to analyze the factual issues presented to the Court [on her behalf], totally ignored any discussion of critically important factual and legal averments***, and relied almost exclusively on the use of conclusionary language***." (Petitioner's Exceptions, at p. 2) She relies upon her post-hearing brief and reply letter brief in support of this position. Further, petitioner avers the ALJ's "conclusions of law" discussion fails to address decisions on her behalf which she argues establishes that the following conditions must be met by a board of education in order to fulfill the Kopera, supra, standards:

> 1. There must be a specific identification of a teaching staff member's inefficiencies and/or deficiencies with regard to the performance of designated professional duties which are based upon clearly identifiable standards and norms adopted by a local board. These standards must be applied uniformly to all individuals in a particular teaching category or classification.
>
> 2. The local board of education must establish that there were comprehensive efforts over a reasonable period of time to remediate perceived inefficiencies based on clearly identifiable standards and norms.

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> 3. A local board of education must establish that the affected teaching staff member had been placed on notice that there were a sufficient number of perceived inefficiencies with regard to the performance of that person's professional duties identified as part of the evaluation process so as to warrant the withholding of an increment sufficiently prior to the invocation of this second most severe sanction against a teaching staff member so as to permit the remediation of any perceived problems. (Cases have clearly established that it is not enough to supply this notice through advising an individual that a determination had been made to withhold his or her increment days before the official Board action.) (Id., at p. 3)

Petitioner contends that the ALJ failed to make any factual findings with regard to whether the Board had proffered any facts to support the four reasons cited by the Board for the withholding action. She likewise avers that the ALJ erred in failing to conclude that (1) the facts upon which the increment withholding were purportedly based were not accurate and/or verifiable; (2) the supposed inefficiencies or deficiencies regarding her performance were not based on any clearly identifiable district standards or norms; (3) there were little, if any, efforts made by district evaluators with regard to remediating perceived inefficiencies in her instructional performance; (4) she was not placed on notice sufficiently far in advance of the recommendation to withhold her increment; and (5) the Board was in total noncompliance with the prescriptions of N.J.A.C. 6:3-1.21 concerning the mutual development of professional improvement plans, a factor which was detrimental to her.

Lastly, petitioner points out that the ALJ erred in stating that her attorney had asked for the recusal of both Judge Cummis and Judge Ospenson, rather than just Judge Cummis. The record affirms this; therefore, the record is corrected to reflect that only Judge Cummis was recused from the proceedings.

As to the other exceptions put forth by petitioner, a review of the record, including post-hearing submissions, exceptions, and transcripts, convinces the Commissioner that the ALJ's recommendation to dismiss the petition is correct. It is well established in case law that in increment withholding cases the Commissioner is not to substitute his judgment for that of those who made the evaluation. Rather, he is to determine whether there was a reasonable basis for the conclusion to withhold. (Kopera, supra, at 296) Pursuant to Kopera, the Commissioner must determine by a preponderance of the credible evidence (1) whether the underlying facts were as those who made the evaluations claimed and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts admittedly without bias or prejudice and closely familiar with the mise en scene. (Id. at 297) Moreover, the Supreme Court has provided further guidance

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with respect to N.J.S.A. 18A:29-14 when ruling in Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Assn., 79 N.J. 311 (1979) that

> ***The decision to withhold an increment - although directly affecting the work and welfare of a teacher - is thus dependent upon an evaluation of the quality of the services which the teacher has rendered. The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. It cannot be bargained away.*** (emphasis supplied) (at 321)

N.J.S.A. 18A:29-14 has no requirement for advance written notice of the intent to withhold. Rather, it requires that within 10 days following its action a board must notify the employee of the reasons why the increment is being withheld. This was done in the instant matter. (P-23) This is not to say, however, that a staff member need not be provided elemental due process rights as indicated in Fitzpatrick v. Bd. of Ed. of Montville, 1969 S.L.D. 4 which reads in pertinent part:

> ***Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous. (at 7)

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In the instant matter, petitioner was noticed by letter of March 30, 1987 (P-22) that there was an administrative recommendation to withhold her salary increments due to negative evaluations that would be considered by the Board on April 6, 1987 and she was afforded an opportunity to have the matter dealt with in public session. As was found in Kouba v. Bd. of Ed. of Leonia, decided by Commissioner June 25, 1984, aff'd State Board October 3, 1984, there is no procedural taint with regard to the fact that petitioner was not given specific notice of the intended withholding until March 30, 1987. Petitioner knew or should have known beginning in December 1986 (P-16) that the principal evaluating her performance was concerned about various aspects of it. It is likewise clear that subsequent evaluations demonstrated that performance problems continued to be exhibited (P-17A; P-20A) as noted not just by the principal but by a different evaluator as well. Thus, it cannot be said that no notice or insufficient notice was provided or that the withholding came as a surprise as was found in Fitzpatrick, supra, or Carney v. Freehold Bd. of Ed., decided by the Commissioner July 20, 1984, aff'd State Board February 6, 1985, aff'd N.J. Superior Court, Appellate Division, November 8, 1985, Dkt. No. A-3190-84T7 (1985).

Petitioner was given a variety of suggestions as aids for improvement beginning in December 1986. However, by March 1987 her performance had not improved sufficiently for the principal to conclude her service warranted a salary increment. The period of time at issue herein is not considered an unreasonable period of time to evaluate if her performance improved to the point of earning a "reward" for her service. On the contrary, the time frame is analogous with the one found in Pollack v. Bd. of Ed. of Ridgefield, decided by the Commissioner June 8, 1984, rev'd State Board February 4, 1985, aff'd N.J. Superior Court, Appellate Division, March 10, 1986, Dkt. No. A-3128-84T7.

Further, the Commissioner finds as meritless the allegation that the ALJ failed to comply with N.J.A.C. 1:1-18.1. The ALJ provides ample findings of fact with appropriate citation to the record to support her conclusion that petitioner did not bear her burden of proof in this matter.

As to the allegation that the Board failed to comply with the Professional Improvement Plan (PIP) requirements of N.J.A.C. 6:3-1.21, even if true, this would not constitute a fatal flaw to the Board's action. Nonetheless, given petitioner's allegations and the assistant superintendent's inconclusive testimony on whether the district's "Professional Growth Objectives" meet the State's requirements for PIP's, the County Superintendent is directed to take whatever steps he deems necessary to assure that the requirements of N.J.A.C. 6:3-1.21 are being fulfilled by the district.

Accordingly, the Commissioner adopts the findings and conclusions of the ALJ. Therefore, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 29, 1988

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PHYLLIS LOEWENGART,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 29, 1988

For the Petitioner-Appellant, Klausner, Hunter and Oxfeld (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Rand, Algeier, Tosti, Woodruff and Frieze (David B. Rand, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

December 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8226-87
AGENCY DKT. NO. 340-11/87

ELAINE BETTENCOURT,
Petitioner,
v.
OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION,
Respondent.

John H. Deppeler, III, Esq., for petitioner

Harold Smith, Esq., for respondent **Scott T. Smith** on the brief, (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 7, 1988 Decided: June 23, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Elaine Bettencourt (petitioner) is employed by the Old Bridge Township Board of Education (Board) as chair of the business department. She claims the Board acted unlawfully, arbitrary, capricious, and unreasonably in its refusal to appoint her to the position of Director of Community School/Federal Funding during 1986, a position for which she claims superior qualifications over appointed applicants. The Commissioner of Education transferred the matter on December 11, 1987 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. This judge was assigned the matter on January 20, 1988 and a telephone prehearing conference was

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scheduled and conducted February 1, 1988. A hearing was scheduled to commence June 20, 1988. The Board seeks dismissal of the Petition of Appeal on the grounds the Petition was filed out of time pursuant to N.J.A.C. 6:24-1.2 and/or the Petition as filed fails to state a cause of action upon which relief may be granted. Petitioner filed no opposition to the motion. On June 15, 1988 counsel to the parties were notified by telephone call that summary decision was to be granted the Board and that this written initial decision would be mailed to the parties shortly thereafter. The scheduled hearing was cancelled.

This initial decision concludes that the Petition of Appeal was filed out of time and that the Petition fails to state a cause of action on which relief could or should be granted. For either or both reasons, the conclusion in this decision is that the Petition must be dismissed.

BACKGROUND FACTS

The background facts of the matter as established by the pleadings, exhibits attached thereto, a certification of Scott T. Smith, Esq., counsel on the brief in support of the Board's motion to dismiss, and exhibits attached thereto are these. Petitioner has for some time been employed by the Board as a teaching staff member. Her current position is that of chair of the Board's Cedar Ridge High School business department. During June 1986 the position of Director of Community School/Federal Funding became vacant. Petitioner was one of six candidates who applied for that position, each of whom were interviewed. Petitioner alleges all six candidates were interviewed by two assistant principals and by the individual who was vacating the position. The Board admits petitioner and the other five candidates were interviewed by the individual who was vacating that position, but denies that two assistant principals interviewed her as well. Petitioner alleges that this "subcommittee" of two assistant principals and the incumbent in the position recommended three candidates to the superintendent. Eventually, the superintendent recommended to the Board that petitioner be appointed to the position. (See Schedule AA, attached to Petition) On August 19, 1986 the Board determined to appoint Jack Phillips to the vacancy. Petitioner contends the superintendent did not recommend Jack Phillips as one of the three finalists. Shortly thereafter, Phillips resigned his newly-appointed position and the Board re-advertised the position. On November 12, 1986 the Board appointed Robert Merenda to the position.

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On November 24, 1986 petitioner expressed in writing to the Board the appointment of Robert Merenda and of Jack Phillips. (See Schedule B, attached to Petition) Petitioner concluded her November 24 letter by requesting the opportunity of meeting with the Board. After various adjournments a hearing was held May 29, 1987, a transcript of which is available, and after which the Board reserved decision. On August 18, 1987 counsel for petitioner was advised by counsel for the Board that the Board concluded petitioner does not have a meritorious claim against it and further advised that the Board rejected petitioner's proposed settlement. (See Schedule C, attached to Petition)

The remainder of the Petition of Appeal sets forth reasons why petitioner alleges the appointments of Jack Phillips and Robert Merenda to the position of Director of Community School/Federal Funding, as opposed to her being appointed to the position, was wrongful and that part of the Petition is reproduced here in full:

> 13. The appointments of Jack Phillips and Robert Merenda to the position, as opposed to Petitioner, was wrongful for various reasons, including but not limited to the following:
>
> (a) Petitioner was the most qualified applicant, with regard to degree held and prior experience, and thus should not have been passed over without good and substantial reasons being set forth on the record by the Respondent (Board).
>
> (b) The appointments were contrary to the recommendation of the Superintendent of Schools.
>
> (c) Failure to appoint Petitioner, a female, was violative of the recommendations made in a study concerning the under utilization of females and minorities in the Old Bridge Township school system conducted by the Middlesex County Board of Education and dated December, 1984.
>
> (d) The appointments were contrary to the guidelines contained in the New Jersey Department of Education manual, which requires that all appointments be made in conjunction with the local Superintendent's recommendation.
>
> (e) The appointments were in violation of Title 18A of the New Jersey State statutes.

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(f) The appointments were in violation of recent United State Supreme Court decisions giving preference to female appointments even if they are less qualified than their male counterparts.

(g) The appointments were contrary to existing administrative regulations in relevant case law.

(h) Petitioner was passed over for appointment to the position without the reasons therefore ever having been set forth in the record***

According to the certification of Scott T. Smith interrogatories were served upon petitioner January 18, 1988 by the Board in an effort to establish the factual and legal basis for the allegations that the actions of the Board were in violation of N.J.S.A. 18A, et seq., administrative regulations and case law, contrary to guidelines of Department of Education manuals, and in violation of recent Supreme Court decisions. Petitioner's response to relevant interrogatories was simply to refer the Board to letters, or that the requested documents would be supplied, or that the interrogatory is improper. Despite a follow-up request of Board counsel to petitioner on April 7, 1988 to supply the requested information in order for counsel to know the factual and legal basis for the Petition, petitioner failed to comply with the otherwise legitimate discovery requests.

This concludes a recitation of the background facts of the matter.

MOTION TO DISMISS

TIMELINESS

The Board contends that the Petition of Appeal must be dismissed because it was filed out of time under the provisions of N.J.A.C. 6:24-1.2 and because it fails to state a cause of action upon which relief may be granted.

N.J.A.C. 6:24-1.2 provides in part as follows:

***

(b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested case hearing.

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This ninety-day provision, it is noted, is to be strictly applied and the ninety-day period is measured from the date when the cause of action accrues. Reily v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980) The ninety-day period will be strictly enforced where a petitioner is aware of an adverse action by a board and thereafter delays in seeking a remedy. North Plainfield Education Association v. North Plainfield Board of Education, 96 N.J. 587 (1984); Reily, supra.

In this case, petitioner knew as early as August 18, 1986 that the Board rejected her application for appointment to the controverted position. Petitioner knew on November 12, 1986 that the Board rejected her application a second time for the very same controverted position. Clearly, petitioner had notice as early as August 19 and no later than November 12, 1986 of the "***final order, ruling or other action***" by the Board which is the subject of this requested case hearing. Ninety days from either August 19 or November 12 was November 17, 1986 and February 10, 1987. This Petition of Appeal was not filed before the Commissioner of Edcuation until November 16, 1987, beyond the ninety-day time limit and in clear violation of N.J.A.C. 6:24-1.2.

Accordingly, the Petition of Appeal must be dismissed for having been filed out of time under N.J.A.C. 6:24-1.2.

FAILURE TO STATE A CAUSE OF ACTION

With respect to the Board's assertion that the Petition fails to state a cause of action, N.J.A.C. 6:24-1.3 sets forth the requirements to be met by a Petition in order to invoke the authority of the Commissioner at N.J.S.A. 18A:6-9. That rule provides in paragraph (a) as follows:

> The petition must include ***a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws*** The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen***

Here, petitioner asserts she was entitled to the position because of superior qualifications, that the superintendent recommended her, that she was a female, that the failure of the Board to appoint her to the position was contrary to an unidentified manual of the Department of Education which purportedly requires all appointments be made "in

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conjunction with" the local superintendent's recommendation, that the failure of the Board to appoint her was in violation of New Jersey school law, that the failure of the Board to appoint her was in violation of unidentified recent Supreme Court decisions, that the failure of the Board to appoint her violated unidentified existing administrative regulations and unidentified relevant case law, and that the failure of the Board to appoint her was improper because it never gave her the reasons why it did not appoint her to the position.

There is no requirement to my knowledge, nor has any been cited to me by petitioner, which would require any board to appoint the most qualified applicant to any position of employment. So long as an applicant is qualified for the position, the board may appoint whom it chooses. There is no requirement that board appointments must be consistent with the recommendation of the superintendent. It is the Board of Education which has the statutory authority to operate the schools it sees fit. N.J.S.A. 18A:11-1. While a board of education may not appoint an assistant superintendent of schools without that person being nominated to it by the superintendent, N.J.S.A. 18A:17-16, no such requirement for the prior recommendation of a superintendent exists for the board to appoint other employees. N.J.S.A. 18A:11-1(c); 18A:27-4. Petitioner pleads no facts which shows how the Board's failure to appoint her to the position violated "recommendations" made in a study during December 1984 and, even if such a study exists and if the Board's failure to appoint her to the position violated that study, how such conduct by the Board is unlawful. Petitioner fails to cite which section of Education Law was violated by the Board, nor does she identify asserted recent United State Supreme Court cases which were to have been violated. Finally, petitioner does not identify which existing administrative regulations or relevant case law the Board was to have violated by its failure to appoint her to the controverted position. There is no obligation whatsoever for any board of education to give any reasons to any unsuccessful applicant.

I **CONCLUDE** the Petition of Appeal presents nothing more than conclusory statements that the Board of Education somehow violated some unidentified law, court ruling, prior commissioner's decision, or administrative regulation in its failure to appoint her to the controverted position. Petitioner sets forth no facts whatsoever in support of her assertions. The Petition of Appeal is insufficient on its face to invoke the authority of the Commissioner of Education at N.J.S.A. 18A:6-9 to proceed further. Accordingly, the Petition of Appeal, I **CONCLUDE** fails to state a cause of action upon which relief could or should be granted. Therefore, for this reason the Petition of Appeal is dismissed.

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In sum, I **CONCLUDE** that the Petition of Appeal filed by Elaine Bettencourt is untimely under the provisions of N.J.A.C. 6:24-1.2 and I further **CONCLUDE** that the Petition of Appeal filed by Elaine Bettencourt against the Old Bridge Township Board of Education fails to state a cause of action upon which relief could or should be granted. Therefore, the Petition of Appeal is dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 23, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

June 24, 1988
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 28 1988
DATE

Ronald L. Rubin
OFFICE OF ADMINISTRATIVE LAW

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ELAINE BETTENCOURT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record the Commissioner is in agreement with the ALJ that this matter is barred for failure to meet the filing requirements of N.J.A.C. 6:24-1.2. Nor have there been any reasons brought to the record to convince the Commissioner that the 90 day filing requirement be relaxed in that petitioner sat on her rights for a year before filing her appeal.

Notwithstanding this fact, the Commissioner does determine the ALJ erred when stating that no requirement exists that board appointments must be consistent with the recommendation of the superintendent. Petitioner is correct in her argument that at the time of the appointments to the disputed position, one of the New Jersey State Department of Education evaluation/monitoring criteria for certification of school districts assessed whether board minutes indicated that the chief school administrator had recommended to the board formal appointment of all teaching staff members. N.J.A.C. 6:8-4.3(6)vii

While it was not required in 1986 that this indicator be met in order to secure district certification, it is now mandatory that the district successfully meet the criteria which states, "The chief school administrator shall recommend to the district board of education formal appointment of all teaching staff members." N.J.A.C. 6:8-4.3(6)vii

While there is nothing in the limited record before the Commissioner to demonstrate that after rejection of petitioner's candidacy, Mr. Phillips' name was not subsequently put forth by the superintendent, the Commissioner admonishes the Board to be diligent in faithfully following the requirement of N.J.A.C. 6:8-4.3(6)vii which mandates that all teaching staff member appointments must emanate from the recommendation of the chief school administrator. While a Board may reject the appointment of a candidate recommended by its chief school administrator, it may not unilaterally appoint on its own initiative another candidate. Rather, it must continue

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to review and act on other candidate(s) recommended by that individual until such time as it approves one of his or her recommendations.

Accordingly, the Petition of Appeal is dismissed as untimely filed under N.J.A.C. 6:24-1.2.

COMMISSIONER OF EDUCATION

August 2, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6111-87
AGENCY DKT. NO. 260-8/87

MICHAEL DE CARLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 6, 1988 Decided: June 20, 1988

BEFORE **BRUCE R. CAMPBELL, ALJ:**

Michael DeCarlo, petitioner, alleges and the South Plainfield Board of Education, respondent, denies that the respondent has violated his tenure rights by its failure to reemploy him in a supervisory capacity following a reduction in force.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14b-1 et seq. and N.J.S.A. 52:14F-1 et seq. Following a conference of counsel on November 25, 1987, the parties submitted a stipulation of facts with attachments. The attachments represent documents that would be admitted in evidence at hearing, either by consent or without objection. Thereafter, the respondent Board moved for summary judgement and the petitioner timely filed papers responsive to the motion.

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The motion was denied by order issued February 25, 1988. Plenary hearing was held on March 31, 1988, in the Middlesex Borough Municipal Court. Both parties filed posthearing submissions and the record closed on May 6, 1988.

STIPULATED FACTS

1. On June 16, 1987 the petitioner held the position of general supervisor at South Plainfield High School in accordance with the job description of of general supervisor attached as Exhibit A, and he had held that position since July 1, 1984.

2. On June 16, 1987 the petitioner held certification as secondary school principal, director of student personnel services, counselor and teacher of social studies and English.

3. As part of an administrative reorganization at the South Plainfield High School and Middle School, a copy of the proposed plan for which is shown in Exhibit C, the Board, at its regular meeting of June 16, 1987, abolished the five positions of general supervisor at the high school effective July 1, 1987. A copy of the resolution appears as Exhibit D.

4. At the same meeting, the Board added four new assistant principal positions, three at the high school and one at the middle school. Exhibit D.

5. At the same meeting, the board approved job descriptions for the new positions designating them as Assistant Principal A (a 12-month position at the high school and middle school) and as Assistant Principal B (a 10-month position at the high school). Exhibit D.

6. At the same meeting, the Board placed the petitioner's name along with the names of the four other teachers whose positions as general supervisors were abolished, on a preferred eligibility list for the position of general supervisor should that position be reinstated. Exhibit D.

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7. At the same meeting, the Board authorized reassignment of the five former general supervisors to different positions. Four were assigned to teaching positions and the petitioner was assigned as a guidance counselor at the middle school at a 1987-88 salary of $42,300 (effective rate after negotiations). Exhibit D. The salary level for this 10-month position is less than petitioner's salary as general supervisor, which, extrapolated for ten months, would have been $44,825. On a 12-month basis it would have been $53,790.

8. The new assistant principal positions were advertised and filled by persons who were not tenured in the district as assistant principals.

9. A vacancy occurred in the position of director of guidance and vocational education as a result of Burton Farber's reassignment to an assistant principalship in the summer of 1987. The current director of guidance and vocational education was not tenured in any supervisory capacity.

10. The petitioner has never held the position of assistant principal in the system.

11. The stipulation of facts filed in DeCarlo v. South Plainfield Board of Education, OAL DKT. EDU 5929-84 (Jan. 17, 1985), aff'd and mod. Comm'r of Ed. (Mar. 4, 1985), aff'd State Board (Sept. 4, 1985), is incorporated by reference into this stipulation, together with the decisions rendered.

OTHER RELEVANT EVIDENCE

The high school principal testified in some detail concerning the goals and implementation of the administrative reorganization at the high school and middle school. From his credible testimony, I **FIND** that the reorganization was undertaken in good faith and for educational purposes.

I also **FIND** that the former general supervisors held and were required to hold principal certificates. See, J-3.

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The petitioner and three of his colleagues who formerly were supervisors testified that they performed many of the same responsibilities now contained in the assistant principal job description. There was also testimony, mainly from the principal, that assistant principals carry out duties beyond those done by general supervisors; e.g., supervision of noncertificated personnel, complete responsibility for ninth grade orientation, complete responsibility for the first faculty meeting of the school year and responsibility for all computer use in the school, both instructional and noninstructional. Generally, assistant principals operate on a buildingwide basis and have broader and more general responsibilities than did the supervisors.

DISCUSSION AND DETERMINATION

The petitioner argues that he should be appointed to either the position of Director of Guidance and Vocational Education or an assistant principalship as that position now exists at South Plainfield High School. He rests his claims on Capodilupo v. W. Orange Tp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987).

In 1985, the petitioner was found not to have seniority rights to the Director of Guidance and Vocational Education position. DeCarlo v. S. Plainfield Bd. of Ed., OAL DKT. EDU 5929-84 (Jan. 17, 1985), mod. Comm'r of Ed. (Mar. 4, 1985). The decision examined the duties of Director of Guidance and Vocational Education and those assigned to DeCarlo's former position Guidance Director. This judge found that the Board had created a new position that included substantiallY all the duties of the former Guidance Director position but which had greater and additional responsibilities, particularly in the area of vocational education. The petitioner's argument that his seniority rights had been violated was rejected. That decision also found no violation of DeCarlo's tenure rights.

Subsequent to that decision, the Appellate Division spoke in Capodilupo, above and Bednar, above. In the first case, the petitioner was a tenured secondary school physical education teacher. Upon a reduction in force (RIF) he appealed to the Commissioner, arguing that he should have been offered one of the two elementary physical education teaching positions held by nontenured staff. One of the nontenured staff members was a "regular" elementary physical education teacher. The other,

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however, had particular training and experience in physical education programs for handicapped children.

The court first examined the seniority claim, citing N.J.A.C. 6:3-1.10(b), "[s] eniority...shall be determined according to the number of academic or calendar years of employment...in specific categories...." The court agreed with the Commissioner and State Board that Capodilupo had no seniority rights concerning the elementary school position. The West Orange Board, of course, contended that this ended the inquiry. The Commissioner agreed but the State Board did not. The Appellate Division, referring to the State Board's decision, stated:

> In reversing the Commissioner, the State Board first reasoned that Capodilupo had tenure in all positions for which his instructional certificate qualified him, including elementary physical education, even though he did not have seniority in that category. Perceiving a gap in the RIF legislation from the use of the word "seniority" and the absence of reference to "tenure" the State Board relied upon its quasi-legislative responsibility to balance "the protection afforded tenured teacher staff members by N.J.S.A. 18A:28-5 and the authority granted to district boards of education by N.J.S.A. 18A:28-9." It ruled that district boards are obliged to take into consideration the tenure rights of individuals affected by a RIF.

The State Board's use of the word "quasi-legislative" was inadvertent. A footnote in the Appellate Division decision recognizes that the decision was properly "quasi-judicial."

In short, the State Board held that seniority provides a mechanism for all tenured teaching staff members so that RIFs, when necessary, can be done equitably and consonant with educational policies. It is axiomatic that seniority does not come into play until there is a reduction in force. A tenured teacher, however, is entitled to retention over a non-tenured teacher under the tenure law. This is something quite different from seniority. And, as the court observed, "To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number years of service." 218 N.J. Super. at 515.

The Appellate Division held that the tenure act should be liberally construed to achieve its beneficent ends. The court upheld the State Board interpretation as being well

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within the compass of the State Board's delegated authority. What all this means is "that a tenured teacher seeking reenstatement within the endorsements on his or her certificate is entitled to preference in a RIF against a non-tenured applicant with the same certification." Ibid.

The court expressly refrained from comment on the portion of the State Board's opinion that held a local board's obligation to consider tenure in a RIF could be balanced by sound educationally based reasons.

In Bednar, the Appellate Division held that the seniority provisions of the tenured teacher statute do not authorize retention of a non-tenure teacher over a tenured teacher in a position within the scope of the tenured teacher's certificate during a RIF, based only on the non-tenured teacher's "seniority" in a secondary school setting. Briefly stated, the seniority provisions in the teacher tenure act concern tenured teachers only. It is not permissible to allow the dilution of an art teacher's tenure rights by reduction in his work hours and retention of a non-tenured teacher full-time in a secondary position, which clearly lay within the scope of the tenured teacher's certificate, on the mere basis of the non-tenured teacher's greater experience in the secondary setting.

There was no argument that the reduction of Bednar's full-time job to part-time constituted a RIF. Bednar asserted that his statutory tenure rights wholly apart from seniority barred the school district from reducing his hours while retaining a full-time non-tenured art teacher. 221 N.J. Super. at 241. Judge Cohen pointed out that one of the provisions of the tenure law is N.J.S.A. 18A:28-9, which provides that tenure does not limit the right of a school district to reduce staff. N.J.S.A. 18A:28-10 provides that, in a RIF, dismissals shall be made on the basis of seniority according to standards adopted by the State. N.J.S.A. 18A:28-13 instructs the Commissioner how to create those standards. N.J.S.A. 18A:28-12 gives staff who are dismissed in a RIF preference in employment. The tenure statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. 221 N.J. Super. at 242. Seniority is a statutory concept that comes into play only when there is a reduction in force and only between and among tenured personnel. The tenure statutes do not create employment rights for non-tenured teachers. Surely, the Legislature did not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the scope of the certificate of a dismissed tenure teacher. Capodilupo, above.

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Where the Capodilupo court refrained from comment on the State Board argument that educational reasons could justify the retention of a non-tenured teacher over a tenured teacher in certain circumstances, the Bednar court was not reluctant. Judge Cohen stated:

> The State Board of Education attempted to fairly resolve a tension it perceived between tenure and seniority. The State Board's solution was to rule that tenure does not permit a teacher to claim an assignment in a job category in which he has no seniority against a nontenured teacher with experience in the category. The Board cited N.J.S.A. 18A:28-10, which invokes seniority to determine job rights in a RIF, and reasoned that since Bednar had no seniority teaching art on a secondary level, his rights were not violated by reducing his hours while retaining a full-time non-tenured secondary art teacher.
>
> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinitive. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority." The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations.
>
> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature....Id. at 242-243.

Thus, the Appellate Division has left no doubt that tenured persons qualified for a position by certification, whether they have served in the precise category or not, must prevail over non-tenured persons for appointment to that position.

The parties have stipulated that the qualifications for assistant principal are (1) an earned master's degree in administration, (2) a minimum of five years' successful teaching experience preferred, (3) principal certification and (4) such alternatives to the above qualifications as the Board may find appropriate and acceptable. Stipulation 5.; Exhibit D. They also stipulated that the petitioner met these criteria as a general supervisor. Stipulation 1; Exhibit A. But the mere fact that the Board required a principal certificate for the general supervisor job does not mean the petitioner achieved tenure as a vice principal or principal. In fact, I FIND that he did not achieve tenure in a

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vice principal or principal category and, therefore, he may not assert seniority rights or tenure rights against vice principals or principals.

The minimum certificate the petitioner needed to be a general supervisor was the supervisor's certificate authorized at N.J.A.C. 6:11-10.9. The principal's certificate may be considered for the purposes of this opinion to subsume the supervisor's certificate. I **FIND** that the petitioner achieved tenure in the supervisor category. N.J.A.C. 6:3-1.10(l)10.

Accordingly, he may assert tenure and seniority rights against other supervisors. If this opinion were to find that the petitioner, by mere possession of the principal's certificate, could assert rights against vice principals and principals, the result would be absurd. The present high school principal does not enjoy a tenure status. The ruling the petitioner seeks would allow him to assert tenure rights based on the mere possession of a principal's certificate against the present principal. This notwithstanding that the petitioner has not served in any position beyond the supervisor level. I cannot believe that either the Legislature or the State Board intended these results.

Accordingly, I **CONCLUDE** that the respondent, under the circumstances of this case, may not assert tenure rights against persons holding vice principal or principal positions. I also **CONCLUDE** that under the holdings in Capodilupo, above, and Bednar, above, the petitioner may assert tenure rights against the current Director of Guidance and Vocational Education who is not tenured in any supervisory capacity. Stipulation 9.

The petition is dismissed in part and granted in part. The petitioner possesses no rights that he may assert against vice principals, assistant principals or principals. He does, however, as a tenured supervisor have tenure rights that he may assert to the position of Director of Guidance and Vocational Education although he has not served in that precise position.

ORDER

Therefore, it is **ORDERED** that the South Plainfield Board of Education place Michael DeCarlo in the position of Director of Guidance and Vocational Education retroactive to the date of Mr. Burton Farber's reassignment to an assistant principalship

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in the summer of 1987 with all back pay and emoluments offset by pay and emoluments earned in the 1987-88 school year.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

20 JUNE 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/20/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 23 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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MICHAEL DE CARLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Both petitioner and the Board filed timely primary exceptions pursuant to N.J.A.C. 1:1-18.4. Petitioner also filed timely reply exceptions.

Petitioner concurs with that part of the initial decision determining that he has tenure rights to the current position of Director of Guidance and Vocational Education, a position presently held by a nontenured teaching staff member. However, he excepts to the ALJ's conclusion that, under the circumstances of this case, petitioner could not assert tenure rights against persons holding the position of vice principal, a position which supplanted petitioner's earlier position of General Supervisor of Business/Physical Education.

Petitioner contends the position of supervisor is effectively no different from that of vice principal. He contends the chief difference between the present position of assistant principal and the former position of supervisor "***is the combination of disciplines each Vice Principal has been given to supervise. ***However, that is a matter of the Board's assignment and should not be made to stand in the way of whatever tenure or seniority rights Petitioner may have." (Petitioner's Exceptions, at p. 2)

Petitioner admits he has never served as an assistant principal, but contends that a board of education

> should not be able to compromise a teaching staff member's statutory rights by the mere juggling of titles and assignments. While the position of Supervisor represents a separate category from the position of Vice Principal for both tenure and seniority purposes, the circumstances of this case demonstrate that the current Vice Principals essentially play the same role as the former Supervisors.*** (Id., at p. 2)

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Petitioner would have the Commissioner review the job descriptions for the position of General Supervisor (Exhibit A) and the job description for the position of Assistant Principal (Exhibit C), and determine that they are effectively the same position. He contends the Board changed the titles to extinguish both his tenure and seniority rights as well as those of his former colleagues and, after years of service as supervisors, has made them go back to classroom positions, while nontenured individuals presently hold the positions of assistant principal. Petitioner claims this goes against both the spirit and the purpose of the tenure laws and relies on Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987), cert. den. 110 N.J. 512 (1988) in support of his position.

Based on the foregoing, petitioner submits that while the Commissioner should affirm the ALJ's decision as it relates to his determination of petitioner's tenure claim to the position of Director of Guidance and Vocational Education, reversal of Judge Campbell's decision is warranted as it related to his determination as to petitioner's tenure and seniority claim to the position of vice principal.

The Board's first exception is predicated on an earlier decision involving this petitioner, DeCarlo v. South Plainfield Board of Education, decided by the Commissioner March 4, 1985, aff'd State Board September 4, 1985 (hereinafter DeCarlo I). Claiming that the same ALJ in that matter found that although there was some overlap, the position of Director of Guidance and Vocational Education contained duties beyond those Petitioner performed in his old position as Director of Guidance. (See DeCarlo I, at p. 10), the Board avers petitioner may not now claim appointment to the position of Director of Guidance and Vocational Education, the same position dealt with in DeCarlo I. Further, the Board argues, the ALJ in the instant matter contradicts himself in ruling in favor of petitioner for the Director of Guidance and Vocational Education position. The Board claims the decision of DeCarlo I was correct and should have been dispositive herein on the issue of the Director of Guidance and Vocational Education position, either on the Board's Motion for Summary Judgment or on the final decision. "No additional facts and circumstances were put into the record on which the change in the ALJ's decision on this issue could properly have been based," the Board argues. (Board's Exceptions, at p. 3)

More specifically, the Board contends in Point I:

> THE DECISION HERE MISCHARACTERIZED THE BASIS OF DECARLO I, AND WAS THEREFORE INCORRECT IN FINDING PETITIONER ENTITLED TO THE POSITION DENIED HIM IN THAT CASE.

The Board avows that in his decision on the earlier summary judgment motion the ALJ "appeared to lose sight of the fact that DeCarlo I had been a tenure decision.***" (Id.) The Board avers that both DeCarlo I and DeCarlo II are about tenure. It claims:

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> If Petitioner had had tenure in the desired position in DeCarlo I, he would have been entitled to it over the non-tenured person and would have been awarded it. The same is true today; if Petitioner had tenure in the Position of Director of Guidance/Vocational Education, he would be entitled to it. But he does not. He has never held it or its equivalent. Nothing has changed since 1984. The duties of Petitioner's old job are still different, though they overlap, from those of the Director of Guidance/Vocational Education. (emphasis in text) (Id., at pp. 3-4)

The Board claims that the record is devoid of any comparison between petitioner's former position as a General Supervisor and the one he seeks as Director of Guidance and Vocational Education. Thus, the Board argues, it is arbitrary and contrary to law for petitioner to be awarded a right to the latter position. Citing Sandri v. Bd. of Ed. of the Bergen County Voc. School District, decided by the Commissioner June 11, 1986 and Miller v. New Providence Board of Education, decided by the Commissioner January 8, 1987, the Board avows the Commissioner in those cases held the positions in question involved duties different from the ones previously performed by the petitioners therein. The Board urges the same result in the instant matter.

At Point II of its exceptions, the Board submits:

THE DECISION MISAPPLIES CAPODILUPO AND BEDNAR.

The Board avows Capodilupo, supra, and Bednar, supra, have not changed prior law. The Board contends:

> Moreover, even if they had, the theory that they could be used to "re-decide" cases decided years before their appearance is certainly repugnant to the public policies in favor of repose, reduction of repetitive litigation, and providing an atmosphere of certainty, or at least reliability, in the law on which boards of education and other decision-makers may reasonably rely. (Id., at pp. 5-6)

Reciting its understanding of the holding of these two decisions, the Board submits that

> ***[n]either of these cases suggests, and no other case holds, that the "mere possession" of a broad certificate entitles the holder to move up, to be promoted, to take a position higher, broader in scope, more complex in duties, and more responsible, or to take a position which is the result of combining two positions -- in only one of which he has ever served. (emphasis in text) (Id., at p. 6)

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At Point III of its exceptions, the Board claims:

> UNDER NO CIRCUMSTANCES WOULD PETITIONER BE ENTITLED TO BACK PAY.

The Board claims even if the initial decision is affirmed, which it is confident will not be the case, award of back pay and emoluments to petitioner must be reversed.

It argues, inter alia, that when the Board made its reorganization decision in June 1987, neither Capodilupo, supra, nor Bednar, supra, had been made public. Bednar, it claims, was not even argued until three months later on September 22, 1987 and, further, Capodilupo was decided on July 2, 1987 and approved for publication on July 22, 1987. It claims, "A school board, acting properly and in good faith, is entitled to rely upon the state of the law, and should not be penalized for such good faith actions on the basis of subsequent legal decisions." (Id., at p. 8)

As a final note, the Board posits that "the tenure statute is designed to give 'a measure of security to teachers after the prescribed number of years of service.' Capodilupo, supra, 218 N.J. Super. at 515; citing Viemeister v. Bd. of Ed. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). It is significant that in this case the tenure law, in entitling Petitioner to resume his previous tenured position as guidance counselor following the abolition of his new position, protected him exactly as envisioned by the Legislature." (Id., at p. 9)

The Board urges the Commissioner to reverse the initial decision insofar as it finds in favor of petitioner.

Petitioner's reply exceptions posit at Point I that DeCarlo I is distinguishable from the instant matter, DeCarlo II. Petitioner claims that the arguments raised in DeCarlo I were related to seniority, which is distinguishable from the instant matter.

> Petitioner does not claim "seniority" to the position of Director of Guidance/Vocational Education. He simply asserts that he has greater rights to that position then (sic) does the present holder of that position, a non-tenured teaching staff member. He makes this claim in accordance with the decisions of Capodilupo v. West Orange Board of Education 218 N.J. Super 510 (App. Div. 1987) and Bednar v. Westwood Board of Education 221 N.J. Super 239 (App. Div. 1987).
> (Petitioner's Reply Exceptions, at p. 1)

At Point II of his reply exceptions, petitioner claims he is entitled to back pay. He argues the Board employed a nontenured teaching staff member in the position of Director of Guidance and Vocational Education despite the fact that it knew that petitioner had tenure as both a supervisor and as a director.

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> As such, it took a calculated risk that either petitioner would not assert his tenure rights to the position or that the Commissioner of Education would not support Petitioner's claim. Part of that risk is an award of back pay by the Commissioner of Education. Now, the Respondent Board of Education seeks to limit that risk by arguing that in no event should back pay be awarded. Its position is not supported either by logic or by case law. (Id., at p. 3)

Averring that his tenure rights were violated in July 1987 when the Board failed to appoint him in the capacity of Director of Guidance and Vocational Education, petitioner claims the Commissioner must award whatever back pay is owed to him.

Petitioner again submits the Commissioner must affirm that part of the initial decision which determined that the Board's failure to appoint him to the position of Director of Guidance and Vocational Education violated his tenure rights, which necessitates reinstatement with all back pay and emoluments owed.

Upon his careful and independent review of the record before him, the Commissioner affirms the initial decision for the reasons expressed therein, as supplemented herein.

The instant matter involves two issues: the first considers whether, on the basis of Capodilupo, supra, and Bednar, supra, and the fact that he served under a supervisor's endorsement as Director of Guidance, petitioner is entitled to the position of Director of Guidance and Vocational Education. The second issue considers whether, on the basis of his having held the position of General Supervisor, petitioner may now claim the position of Assistant Principal which duties, he claims, are indistinguishable from those performed in his capacity as General Supervisor. The Commissioner will first address the position of Assistant Principal.

In ascertaining whether petitioner may lay claim to the position of Assistant Principal by virtue of his having served in the capacity of General Supervisor, the County Superintendent's letter of April 18, 1985 (Exhibit C, Notice of Motion for Summary Judgment with Accompanying Brief and Exhibits, dated December 18, 1987) serves as the linchpin. Dr. Virginia L. Brinson, County Superintendent, assigned the position of General Supervisor to the category of supervisor for seniority purposes. Therefore, one can conclude that by virtue of approving the unrecognized title of General Supervisor and requiring a supervisor's endorsement, not a principal's endorsement, the holder of said position would accrue seniority in the category of supervisor, pursuant to N.J.A.C. 6:11-10.9 and N.J.A.C. 6:3-1.10(1)10. The ALJ so found and the Commissioner concurs. (Initial Decision, ante)

Because supervisors and assistant or vice principals are separately tenurable positions pursuant to statute, N.J.S.A. 18A:28-5, petitioner acquired tenure as a supervisor, not a vice

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principal, notwithstanding the fact that he may have also held a principal's endorsement. Therefore, petitioner had no claim to the position of vice principal. The Commissioner so finds notwithstanding the Board's having required such general supervisors to hold a principal's endorsement. In this regard the Commissioner concurs with the ALJ's conclusion that an absurd result would ensue if mere possession of the principal's certificate could grant petitioner "bumping" rights over other assistant principals and principals without having served in a principal's capacity. In sum, what the Board requires candidates for an unrecognized position to hold must comport with that which the County Superintendent dictates is required. In this case, the County Superintendent having indicated that the proper endorsement was that of supervisor, not principal, no rights accrued to petitioner beyond the role of supervisor, notwithstanding his having held the principal's endorsement.

Moreover, the Commissioner's review of the job description for the position in question tends to reflect the fact that although there is overlap, there are significant distinguishing duties between the position of General Supervisor and either an Assistant Principal "A" or Assistant Principal "B" that inure against any argument suggesting bad faith on the part of the Board as a means of defeating petitioner's tenure and seniority rights. The Commissioner so finds. Consequently, the Commissioner adopts as his own the conclusion of the Office of Administrative Law finding that "the [petitioner], under the circumstances of this case, may not assert tenure rights against persons holding vice principal or principal positions." (Initial Decision, ante)

The other issue remaining for disposition pertains to petitioner's claim to the position of Director of Guidance and Vocational Education, a position to which he was found not to be entitled in an earlier decision of the Commissioner (DeCarlo I).

The Commissioner will first address the argument related to repose. Had the second RIF in this school district been affected before the disposition of the two cases cited, Capodilupo, supra, and Bednar, supra, the Commissioner would indeed agree with the Board that this matter is res judicata. However, such is not the case. As noted by counsel for the Board in its exceptions to DeCarlo II, the Board's second RIF took place in June 1987. It is true that the Appellate Division was at that point yet three months from hearing the appeal in Bednar, supra. However, the seminal case on point was the State Board's September 3, 1986 reversal of the Commissioner's decision in Capodilupo, supra, fully nine months before the RIF in question, and years after the 1984 RIF at issue in DeCarlo I. The Appellate Division decision in Capodilupo, which was decided July 2, 1987, one month after the Board's second RIF, was merely an affirmance of the State Board's decision. In the initial decision, ante, the ALJ cites the Appellate Division decision in Capodilupo, noting in particular that the court referred to the State Board's decision in stating:

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> In reversing the Commissioner, the State Board first reasoned that Capodilupo had tenure in all positions for which his instructional certificate qualified him, including elementary physical education, even though he did not have seniority in that category. Perceiving a gap in the RIF legislation from the use of the word "seniority" and the absence of reference to "tenure" the State Board relied upon its quasi-legislative responsibility to balance "the protection afforded tenured teacher staff members by N.J.S.A. 18A:28-5 and the authority granted to district boards of education by N.J.S.A. 18A:28-9." It ruled that district boards are obliged to take into consideration the tenure rights of individuals affected by a RIF.

The State Board's use of the word "quasi-legislative" was inadvertent. A footnote in the Appellate Division decision recognizes that the decision was properly "quasi-judicial."

In short, the State Board held that seniority provides a mechanism for all tenured teaching staff members so that RIFs, when necessary, can be done equitably and consonant with educational policies. It is axiomatic that seniority does not come into play until there is a reduction in force. A tenured teacher, however, is entitled to retention over a non-tenured teacher under the tenure law. This is something quite different from seniority. And, as the court observed, "To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number years of service." 218 N.J. Super. at 515.

The Appellate Division held that the tenure act should be liberally construed to achieve its beneficent ends. The court upheld the State Board interpretation as being well within the compass of the State Board's delegated authority. What all this means is "that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF against a non-tenured applicant with the same certification." Ibid.

(Initial Decision, ante)

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Thus, at the time of its second RIF in June 1987, the Board knew or should have known of the State Board's determination of September 3, 1986 in Capodilupo which held that

> ***where a board validly determines that a reduction in force is necessary, it has an obligation to attempt to recognize the tenure rights of a teacher affected by the reduction. This obligation does include consideration of the reassignment of the affected teacher to assignments filled by non-tenured teachers for which he is qualified, but which are in categories in which he has no seniority.
> (Slip Opinion, at p. 20)

The Commissioner dismisses as being without merit the Board's contention that the state of the law did not change from prior case law as a result of the State Board's decision in Capodilupo on September 3, 1986. The error in the Board's position lies in its reasoning that

> ***neither of these cases [Capodilupo or Bednar] suggests, and no other case holds, that the "mere possession" of a broad certificate entitles the holder to move up, to be promoted, to take a position higher, broader in scope, more complex in duties, and more responsible, or to take a position which is the result of combining two positions -- in only one of which he has ever served. (emphasis in text)
> (Board's Exceptions, at p. 6)

In fact, the State Board's decision in Capodilupo found that a tenured teacher who holds the proper endorsement and has served under that endorsement, shall prevail over a nontenured teacher competing for the same position, albeit that the tenured teacher has not served in that precise position. See Milton Schaeffer v. Board of Education of the Borough of South Orange-Maplewood, decided March 14, 1988. In that matter the Commissioner, relying on Bednar directed the reassignment of that petitioner to a newly created supervisory position by virtue of petitioner's having acquired a tenured status under the endorsement of supervisor which he was required to hold as a condition for his prior employment by the Board in the position of District Director, Department Head (English).

The Commissioner notes that Schaeffer distinguished Miller v. New Providence Bd. of Ed., decided by the Commissioner January 8, 1987 from the facts in Schaeffer. The Commissioner finds this Board's reliance on that case inapposite for the same reasons expressed in Schaeffer:

> The Board also cites Miller v. Bd. of Ed. of the Borough of New Providence, 1987 S.L.D. (decided by the Commissioner on January 8, 1987),

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> wherein the Commissioner held that Miller may not rely on Capodilupo "inasmuch as he had never previously performed any of the major duties of vice-principal in his former title, nor had he previously acquired tenure in the position of vice-principal."
>
> The distinction must be noted between Miller and the instant matter as the petitioner herein performed the duties of supervisor, albeit for grades 6-9, and is in fact tenured in that category. (Slip. Opinion, at p. 5)

Moreover, the Commissioner finds no merit in the Board's argument that the issue of whether petitioner is entitled to the position of Director of Guidance and Vocational Education is res judicata as a result of the Commissioner's decision in DeCarlo I. Once the position of Director of Guidance and Vocational Education became available again by virtue of the previous occupant's having been transferred to the position of Assistant Principal, a new cause of action arose concerning the new vacancy in that position. See Paul Gordon v. Board of Education of the Township of Passaic, decided by the Commissioner March 27, 1986. Although petitioner in the instant matter was not victorious in claiming entitlement to the position as against Mr. Burton Farber on the basis of seniority or tenure in 1984, once Mr. Farber vacated that position to assume another and the Board filled the job anew with a nontenured teaching staff member, new facts existed, thus establishing a new cause of action and defeating any argument that res judicata applies. In the interim, of course, the State Board decided Capodilupo, followed by the Appellate Division's determinations in both Capodilupo and Bednar, significantly altering the state of the law relative to tenured teachers' rights in a RIF situation. Petitioner herein had acquired tenure in a supervisory capacity, as Director of Guidance. The person currently holding the position of Director of Guidance and Vocational Education is not tenured in any supervisory capacity. Capodilupo and Bednar require that although petitioner has not served in the precise position of Director of Guidance/Vocational Education, his tenure rights as a supervisor mandate he has entitlement to said position over the nontenured supervisor.

Thus, the Commissioner need not reach the argument raised by the Board in reliance upon Sandri, supra, because Capodilupo and Bednar supersede such case law. As noted above, Sandri was decided in June 1986. The State Board reversal in Capodilupo was decided in September 1986.

Accordingly, for the reasons expressed in the initial decision as supplemented herein, the initial decision of the Office of Administrative Law is adopted as the Commissioner's own. He therefore directs that the South Plainfield Board of Education place

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petitioner in the position of Director of Guidance and Vocational Education retroactive to the date of Mr. Burton Farber's reassignment to an assistant principalship with all back pay and emoluments due and owing, less those remunerations he has received in his capacity as guidance counselor.

COMMISSIONER OF EDUCATION

August 4, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5588-87

AGENCY DKT. NO. 225-7/87

GERALD CAPUTO,

Petitioner,

v.

BOARD OF EDUCATION

OF THE CITY OF UNION CITY,

Respondent.

Arnold M. Mellk, Esq., for petitioner

(Katzenbach, Gildea & Rudner, attorneys)

Kevin Kovacs, Esq., for respondent

(Lowenstein, Sandler, Kohl, Fisher & Boylan, attorneys)

Record Closed: June 13, 1988 Decided: June 17, 1988

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

Petitioner Gerald Caputo was head coach from 1983 to 1986 at the respondent Board of Education's ("Board's") Emerson High School. Mr. Caputo alleges that the Board's refusal to rehire him in 1987 was wrongful retaliation for his participation in unsuccessful political efforts in the April 1987 Board election. That is, Mr. Caputo contends that the Board violated his rights under the First and Fourteenth Amendments to the U.S. Constitution and under Article One, paragraphs 1 and 6, of the New Jersey Constitution.

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Mr. Caputo demands to be rehired and awarded the "stipend" he would have received for the 1987 season.

The Board denies any "political" purpose but also submits that, even if his political activities were the basis for its refusal to rehire Mr. Caputo, its action was lawful in view of the "broad discretion" granted to school boards in appointment of persons for extracurricular activities.

PROCEDURAL HISTORY

On July 23, 1987 a verified petition was filed with the State Commissioner of Education wherein Gerald Caputo sought relief including reinstatement and payment of the $2,800 coaching stipend he would have received for the 1987 season.

On August 17, 1987 the Board's verified answer with defenses was filed. The matter was then transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on August 19, 1987. N.J.S.A. 52:14F-1 et seq.

On October 27, 1987 a prehearing order was entered in the OAL setting forth the issues and hearing dates of April 11, 12, 13 and 14, 1988. The Board moved for an order permitting deposition of Mr. Caputo which was opposed, and on December 23, 1987 an order was signed by Administrative Law Judge Ken Springer denying the motion.

On February 25, 1988 the Board filed a motion for summary decision with supporting affidavit, exhibits and brief. Mr. Caputo opposed the motion with a brief and exhibits. ALJ Springer found there were "genuine issues of material fact" and denied the Board's motion by way of his letter dated April 4, 1988.

On April 11, 1988, the Board's attorney requested adjournment of the hearing, so he could seek an interlocutory appeal of ALJ Springer's denial of the summary decision motion. I denied the request and testimony was taken from petitioner's four witnesses on April 11 and 14, 1988. The Board's witnesses gave testimony on May 2,

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1988. The record was closed on June 13, 1988, following argument on the issue of whether notice could be taken of facts set forth in earlier administrative decisions relative to the Board.

FACTUAL DISCUSSION

I. I FIND the following FACTS based upon the witnesses' common and/or uncontradicted testimony. I also note earlier administrative decisions relative to the Board.

For many years, the Board was dominated politically by the Musto organization ("Musto"), which utilized a partisan patronage system whereby political workers were rewarded with public positions and political opponents were subject to removal.

In the early 1980's the Alliance Civic Association ("Alliance") was formed to wrest power from Musto. By that time, several Musto leaders had been indicted and the organization was losing its grip on Union City.

Alliance became actively involved in Board elections and by 1983 its candidates had won seats on the Board. By 1985 Alliance had a five to four majority on the Board. In 1986, 1987 and 1988 new groups challenged Alliance. Despite its competition, however, Alliance steadily increased its majority control of the Board: in 1985 and 1986 Alliance had five of nine seats, and in 1987 six of nine.

Alliance itself was charged with partisanship and irregularities in the April 1987 Board election. In his initial decision, Helga Milan-Vera, et. al. v. Bd. of Ed. of Union City, OAL DKT. EDU 2592-87 (May 6, 1987), adopted with modifications by Comm. of Ed. (June 15, 1987) at page 13, ALJ Ward Young found irregularities and election law violations attributable to Alliance had occurred in the April 1987 Board election. ALJ Young also specifically noted that governmental "employment security in Union City is more dependent upon political affiliation than on the quality of one's job responsibilities." In his decision adopting the initial decision with modifications, Commissioner of Education

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Dr. Saul Cooperman also cited "grave concerns about the taint of partisan involvement in the (April 1987 Board) election..." Helga Milan-Vera, et. al. v. Bd. of Ed. of Union City, Commissioner of Education Decision, 161-87 (June 15, 1987) at page 22.

High school football is a significant part of the lives of many Union City residents. For over 30 years "Pep" Novotny was the head coach of the Board's Emerson High School football team. After Coach Novotny's retirement in 1983, Mr. Caputo was hired as head coach. Mr. Caputo was a teacher at Emerson High School and a longtime resident of Union City who had played under Novotny.

Mr. Caputo was known to be dedicated to his team. He monitored and encouraged his players academically and his teams had very successful records.

In 1984, in response to a suggestion by Alliance Board member Bruce Walter, Mr. Caputo said he did not have any interest or intention to get involved in politics. Each year thereafter, the Board delayed its decision on rehiring Mr. Caputo. This delay disrupted his year-round training program. In 1985, Mr. Caputo was transferred from Emerson High School to another school in the Board's system, making it more difficult for him to get to football practice and to manage and encourage his players. The school's weight room was made unavailable to Mr. Caputo's team. In 1987 Mr. Caputo was asked by his players if he was going to be "fired." Mr. Caputo began to fear that his lack of political work for Alliance would result in his losing his coaching position.

In the April 1987 Board election, Mr. Caputo decided to work against Alliance with a group known as C.A.R.E. He did this to secure his position as coach and to obtain a transfer back to his previous teaching assignment at the Emerson High School. Mr. Caputo handed out C.A.R.E. literature and gave some of it to his players to distribute.

As a result of the election, Alliance gained an additional seat on the Board; C.A.R.E. was unsuccessful. In June 1987 the Board met, and this time its agenda showed Leonard Introna, a former assistant coach, as the nominee for head football coach. Many parents and football players appeared in support of Mr. Caputo. However, the Alliance

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Board members voted in a block, six to three, to hire Mr. Introna, who had never been politically active. Board President Jose Fuentes, an Alliance member, explained his personal vote by saying that Mr. Caputo had "politicized" his players by involving them in the election and parents had complained about that. Mr. Fuentes would not allow the other Board members to be polled or to explain their reasons for their votes.

Under Coach Introna, the Emerson team was also very successful, winning the county championship and going to the State championship, where it lost its only game.

II. The following is a summary of testimony relating to facts which are in dispute.

A. RONALD DARIO'S TESTIMONY:

Ronald Dario has lived in Union City for 30 years and he served there as a City Commissioner from 1974 to 1982 and from 1985 to 1988. He has also been elected to the State Assembly from Union City. Mr. Dario was called by the petitioner and credibly testified as follows:

Although he was one of its founders, Mr. Dario now opposes Alliance.

Mr. Dario alleged that as it gained political power, Alliance utilized the same kind of patronage system that Musto used previously. Public jobs were "rewards" for delivering votes and for other efforts; e.g., "door knockers" and "bell ringers," people with large families, and people who "stood up at meetings" were all significant in descending order. Given this system, a person who was not a political worker was not secure in a position with the Board's school system, because the Board was controlled by Alliance.

Prior to the 1986 season, Alliance Board members Walters and Baldini told Mr. Dario that they intended to fire Mr. Caputo. The men discussed the matter and Mr. Caputo's lack of political work was raised. This distressed Mr. Dario, who was an active supporter of the football team and wanted to see the team continue its success. Mr. Dario succeeded in convincing them that Mr. Caputo should not be fired because he was a good

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coach and Mr. Caputo was rehired for the 1986 season.

In 1987, Mr. Dario left Alliance because of his opposition to its patronage system, as evidenced by the decision not to rehire Mr. Caputo.

Although Mr. Introna was not politically active prior to his being hired by the Board, during the 1988 election campaign, Mr. Dario saw Mr. Introna "standing" with a group of Alliance supporters.

B. RALPH LANNI'S TESTIMONY:

Ralph Lanni is a resident of Union City who served on the Board from 1970 until 1977 and from 1985 until April 1988. Mr. Lanni was called by the petitioner and testified as follows:

In Mr. Lanni's opinion, there has been a definite "animosity" between Alliance and its opposition parties. Mr. Lanni was a member of C.A.R.E. and its successor, "SOS", two of those opposition parties. In April 1988, a few days before he testified, he lost his Board seat to an Alliance candidate.

Mr. Lanni was a member of the Board in March 1987 when the agenda included the proposal that Mr. Caputo be hired as head football coach. At the meeting, however, Board President Fuentes, an Alliance member, moved successfully to table the matter.

Appointments such as head football coach usually come by way of recommendations from the superintendent and the appropriate committee. That committee included only Alliance Board members. Pursuant to the committee's recommendation, at the Board's June 1987 meeting, the agenda listed Leonard Introna as the nominee for the head football coach position. When the Board discussed the matter, the non-Alliance Board members accused the Alliance Board members of having a "political" purpose in hiring a new coach instead of Mr. Caputo. The Board's vote was six to three to hire the new coach, with all the Alliance members voting to hire Introna.

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C. GERALD CAPUTO'S TESTIMONY:

Petitioner Gerald Caputo credibly testified as follows:

Mr. Caputo is an industrial arts teacher employed by the Board at its Emerson High School since 1972. He lived in Union City for 27 years and he had played football at Emerson under Coach Novotny.

In June 1983 Alliance Board member Bruce Walter spoke to Mr. Caputo about his coaching plans. At the conclusion of their conversation, Mr. Walter said he "liked" Mr. Caputo's program.

There is no dispute that Mr. Caputo was a dedicated coach and in 1983 Mr. Caputo's team won its county championship with a record of six wins, two losses and one tie.

Prior to Alliance's coming to power, positions such as head football coach were "posted" as available every year after the close of the season. After Alliance, there were delays in the posting and awarding the jobs. The football coach position, for example, previously had been posted in about January. After Alliance, it was not posted until the spring and was not acted upon until late spring. This disrupted Mr. Caputo's coaching plans. For example, after the 1983 season, Mr. Caputo wanted to work up his program for the next year but the coaching position was not posted as usual in January (1984). Mr. Caputo approached Board member Walter about the delay in posting the position, and Mr. Walter advised Mr. Caputo to "get involved" in order "to get anywhere in this town," but Mr. Caputo's response was that "politics is not my bag."

In May 1984 Mr. Caputo was rehired. His 1984 football season was again successful, but the posting and rehiring process was again delayed in 1985.

Mr. Caputo's work as head coach did not end with the season. For example, setting up the next year's schedule, ordering equipment, getting his players into colleges and setting up a weight training program involved time throughout the year. Emerson players

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often did not have good standard test scores and football was the only route to college for many of them, so Mr. Caputo was particularly active in that regard. He supplied a reporting form to teachers which helped him monitor his players academically so he could encourage them to keep up their studies to enable them to get into college.

In April 1985 Mr. Caputo was told by Emerson High School Assistant Principal Fazio that he was "gone," because he was not working politically. In May 1985 Mr. Caputo appeared at a Board meeting and asked when action on the coaching position would be taken. However, he received no definite answer.

In June 1985 four Alliance Board members, Walter, Perez, Fuentes and Dr. Baldini, interviewed Mr. Caputo and two other candidates. While Mr. Caputo waited, the two others were interviewed for five to ten minutes each. Mr. Caputo's session lasted about two hours and he felt he was being "grilled." He became so unnerved that at one point he asked for an opportunity to speak to an attorney. At that time, Dr. Baldini remarked, "That's why you're being fired...you're a wise guy." Mr. Caputo then walked out saying, "You don't care about football." Mr. Caputo was rehired for 1985 and had a record of seven wins and two losses for that season.

By 1985, Mr. Caputo had seniority over two other industrial arts teachers in Emerson High School where he was assigned. Historically, coaches were assigned to teach in the school where they coached. In 1985 a reorganization of the school system was planned. In response to his inquiry, Mr. Caputo was told he would be one of two industrial arts teachers to remain at Emerson. Nonetheless, in August 1985, he was transferred to another school, which he unsuccessfully grieved. Many other teachers were also transferred as part of the reorganization.

The Emerson High School's weight room had been used as part of the off-season training program for Mr. Caputo's football players. After 1985 it became unavailable to Mr. Caputo's team. Mr. Caputo asked Alliance Board members Fuentes and Walter about this, and they explained that because of the expense, it was not practical to keep it available to the team during the off-season.

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Mr. Caputo was rehired in 1986 and his team won seven games and lost two.

In January 1987 the head football coach position was posted and Mr. Caputo submitted his application. He also appeared at Board meetings seeking to learn when action would be taken, but he could get no answer. To settle the matter, Mr. Caputo appeared at the Board's March 1987 meeting. Parents and students were also present in support of Mr. Caputo. At that time Board President Fuentes told Mr. Caputo he was an "excellent" coach and he would have his vote for the position. However, no action was taken by the Board at the meeting.

To secure his position as coach, Mr. Caputo worked against Alliance in the April 7, 1987 Board election campaign. Following the election, in which his party was unsuccessful, Mr. Caputo attended the Board's meeting and asked when action would be taken on the head football coach position. Board President Fuentes responded that the Board had "other worries" and that "football is a minute part" of the Board's concerns. Mr. Caputo's name did not appear again on the Board's meeting agenda as the nominee for coach. Instead the Board nominated his former assistant, Mr. Introna, who was hired at the June 1987 meeting.

The Board made the weight room available again to the team after Mr. Caputo's departure.

D. JOSEPH R. MARINI'S TESTIMONY:

Joseph R. Marini was called by the respondent Board and testified as follows:

In 1984 and 1985 Mr. Marini was principal of Emerson High School when Mr. Caputo was a shop teacher there. During that time, the Union City school system underwent a staff consolidation for the purpose of reducing staff while maintaining efficiency. Two dozen teachers were transferred. Also, over 70 nontenured teachers were "let go," although many of them were recalled.

Mr. Marini recommended the transfer of Mr. Caputo in part because there had been

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complaints by school administrators that they could not locate Mr. Caputo and by his fellow teachers that Mr. Caputo was not helping out when needed. Mr. Marini felt that Mr. Caputo could be transferred with no harm and he knew of no "political" purpose in the transfer.

Mr. Marini was aware of Mr. Caputo's unsuccessful grievance of his transfer, and he did not remember Mr. Caputo complaining of "political" motivations during the grievance proceedings.

E. JOSE FUENTES' TESTIMONY:

Jose Fuentes was called by the respondent Board and testified as follows:

Mr. Fuentes, an attorney, is a member of Alliance and was a member of the Board from April 1982 to April 1988.

In 1982 Mr. Fuentes and others founded Alliance as a nonpartisan Union City political organization to sponsor candidates for public offices in opposition to the Musto candidates.

One of Alliance's original objectives was to end Musto's practice of terminating public employees who failed to support the organization. Mr. Fuentes' sister lost her job as a teacher for that reason. Alliance also wanted to rotate extracurricular school personnel and to avoid personnel being "locked in" year after year. This would encourage new applicants with fresh ideas which could benefit the students.

Mr. Fuentes recalled the Alliance Board members' June 1985 interview of two other coaching candidates and Mr. Caputo. Mr. Fuentes, however, believed that the interview of Mr. Caputo lasted only about one-half to three-quarters of an hour, after which Mr. Caputo "stormed out" with tears in his eyes.

In 1987, prior to the April election, Mr. Fuentes had told Mr. Caputo many times

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that he would support hiring him again as coach. After the election, Mr. Fuentes claimed he received telephone calls from parents complaining that Mr. Caputo had "involved" school children in the Board election. Mr. Fuentes personally found this "objectionable," although he carefully denied knowledge of the motives of other Alliance Board members who voted to hire Mr. Introna instead of Mr. Caputo. Mr. Fuentes, however, denied that Mr. Caputo's lack of support for Alliance was discussed during the Board's June 1987 meeting when the vote was taken approving Introna.

III. I FIND the following salient FACTS by incorporating the witnesses' common and/or uncontradicted testimony and by weighing the testimony relating to facts which are in dispute:

1. The Board under Musto used a patronage system by which supporters of the party in power would be rewarded with public positions and opponents of the party in power would lose their public positions.

2. The Emerson High School head football coach was and is a prominent public position in Union City.

3. In 1983, when Mr. Caputo was first hired as head football coach, the Board was in a transition period. Musto was beginning to lose power and Alliance was beginning its rise to power.

4. In 1984, Mr. Caputo advised Alliance Board member Walter that he did not wish to become involved in politics and in 1983, 1984, 1985 and 1986 Mr. Caputo was not politically active.

5. By 1985, Alliance had a majority of members on the Board.

6. Although Mr. Caputo's coaching record and reputation were very good, the Board delayed action on rehiring him as a coach in 1984, 1985 and 1986.

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7. Mr. Caputo appeared during this OAL hearing to be a man of average emotional makeup yet during his June 1985 meeting with Alliance Board members, Mr. Caputo was driven to the point where he had tears in his eyes.

8. In 1985 the Board withdrew use of the weight room from Mr. Caputo's team. In 1987, after Mr. Caputo's departure, the Board made the weight room available again to the new coach's team.

9. In 1985 Mr. Caputo was transferred to another teaching assignment, making it more difficult for him to get to football practice.

10. In January 1987, Board President Fuentes told Mr. Caputo that he was an "excellent" coach and that he would support his rehiring as coach. However, in March 1987, when Mr. Caputo was shown on the Board's agenda as the candidate to be rehired as head football coach, Mr. Fuentes moved to table the matter. At that time Mr. Caputo had declined to become politically active.

11. In April 1987, Mr. Caputo supported the party opposing Alliance in the Board election held that month.

12. Only Alliance members were members of the Board's three-person committee which recommended candidates for the position of coach; and in June 1987, when the Board acted to consider hiring the coach, Mr. Caputo did not appear on the agenda as a potential candidate.

13. In June 1987, six of the Board's nine members were members of Alliance and all six Alliance members voted to hire Mr. Introna as coach instead of Mr. Caputo, consistent with the committee's recommendation.

14. After being confronted with allegations by the public that the vote to replace Mr. Caputo was "political," Board President Fuentes explained his own vote by saying that he objected to Mr. Caputo's involving his players in the Board

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election. However, he would not allow the other Board members to explain their reasons for their votes.

15. Consistent with the above factual pattern, Alliance also utilized a patronage system which dictated that (a) a person who opposed Alliance was in jeopardy of losing his position and (b) the prominent position of head football coach could not be awarded to a member of an opposition political party. I note that this finding is made based on witness credibility and that it could be made even without reference to the decisions of ALJ Young and Commissioner Cooperman.

16. Even if it were accepted that Mr. Fuentes voted to replace Mr. Caputo based upon his personal objection to Mr. Caputo's involvement of school children in Board politics, it must be inferred that the five remaining Alliance Board members voted to purge Mr. Caputo because of his political affiliation, in keeping with Alliance's patronage system.

17. Consistent with the above, the Alliance five-vote majority of the nine member Board (or the Alliance six-vote majority including Fuentes' vote) resulted in the decision not to rehire Mr. Caputo because of his political affiliation.

LEGAL ISSUES AND CONCLUSIONS

Ordinarily, a board of education would have no duty to hire someone for a nontenured coaching position. See, Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65 (1962). Also, absent proof of illegality or impropriety, a board's broad discretionary authority to employ someone is entitled to a presumption of correctness. Schinck v. Bd. of Ed. of Westwood Consol. School Distr., 60 N.J. Super. 448 (App. Div. 1960), Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40, 46 (App. Div. 1962). However, the wide latitude enjoyed by a board of education is conditioned upon Fourteenth Amendment limitations. Winston v. Bd. of Ed. of South Plainfield, 125 N.J. Super. 131, 143 (App. Div. 1973) aff'd 64 N.J. 582 (1974). Thus, a board may not refuse to

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rehire a nontenured teacher or coach of an extracurricular activity because of his membership in a political party or his exercise of constitutional rights to speech and assembly. See, Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 242 (1974); See also, U.S. Const., Amend. I and XIV and N.J. Const. Art. I, par. 1 and 6.

The question here, therefore, is whether the presumption favoring the Board has been overcome and whether it has been sufficiently proven that the Board's decision not to rehire Mr. Caputo resulted from the improper purpose of purging Mr. Caputo solely because of his membership in an opposing political party. If the Board's action was induced by improper motives, it is subject to scrutiny and correction. See, Kopera v. Bd. of Ed. of the Township of West Orange, Essex County, 60 N.J. Super. 288, 294 (App. Div. 1960); Parsippany-Troy Hills Education Association v. Bd. of Ed. of Parsippany-Troy Hills Township, 188 N.J. Super. 161, 167 (App. Div. 1983), certif. den. 94 N.J. 527 (1983); Ramapo-Indian Hills Education Association, Inc. v. Ramapo-Indian Hills Regional High School District Bd. of Ed., 176 N.J. Super. 35, 45 (App. Div. 1980); Thomas v. Bd. of Ed. of Morris Township, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd. 46 N.J. 581 (1966).

Based upon the above factual findings, I must CONCLUDE that the Board's vote and decision not to hire Mr. Caputo for the 1987 season did result from the unlawful motive of purging Mr. Caputo solely because he exercised his constitutional rights of speech and assembly. However, to force Mr. Caputo back in as coach given the circumstances, would probably be impractical and disruptive to the students. Therefore, some other remedy must be ordered.

ORDERS

I ORDER that within 45 days of the date of this decision, the Board pay to Mr. Caputo, as an exemplary measure the $2,800 coaching stipend he would have received for the 1987 season. It is also recommended that Mr. Caputo's name be included the next time the Board considers candidates for the position of Emerson High School head football coach; that the Board's deliberations in this regard at all times be in open view, public and recorded; and that following the vote, the Board, if requested, permit the polling of each of its members so that he or she must explain the reasons for his or her vote.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

6/17/88
DATE

JOHN R. TASSIM, ALJ

Receipt Acknowledged:

6/22/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 22 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ro/e

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GERALD CAPUTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. The Commissioner finds, however, that that untimely document submitted by the Board described as "its Reply and Cross Exception and Objection to the Initial Decision by the Office of Administrative Law***" (at p. 1) is not a timely reply to petitioner's timely exceptions but instead is an effort seeking to remedy the untimely nature of what are primary exceptions from the Board. Such submission cannot be accepted in that it is inconsistent with N.J.A.C. 1:1-18.4 and is thus not made a part of the Commissioner's decision below. Petitioner's timely reply exceptions to the Board's exceptions are therefore also not considered in this determination.

Petitioner takes exception to that portion of the initial decision wherein it was concluded that "to force Mr. Caputo back in as coach given the circumstances, would probably be impractical and disruptive to the students." (Exceptions, at p. 1, quoting Initial Decision, ante) Petitioner avers there were no facts or evidence placed in the record which would establish that his reinstatement would be either impractical and/or disruptive to the students. He further avers that the U.S. Constitution and Shelton v. Tucker, 364 U.S. 479, 5 L.Ed. 2d 231, 81 S.Ct. 247 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 17 L.Ed. 2d 629, 87 S. Ct. 675 (1967); and Perry v. Sindermann, 408 U.S. 593, 598 require that he be reinstated as Head Coach, football, Emerson High School, for the 1988 season.

Upon his careful and independent review of the record which, it is noted, does not include a transcript of the hearing below, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law for the reasons expressed therein. He does, however, modify the relief granted as indicated below.

The Commissioner expresses his very grave concern with yet further indication provided in this case that the Board of Education of Union City might in any manner be subject to partisan political

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factions vying for domain over the public schools of that city. The Commissioner decries such activity and reinforces the statements made in Helga Milan-Vera et als. v. Board of Education of Union City, Hudson County, decided by the Commissioner June 15, 1987 wherein it was stated:

> ***It is quite clear that the ALJ, based upon hearing the testimony in this matter[,] was extremely concerned with the intrusion of partisan politics into the school election in Union City and other voting improprieties, a concern shared by the Commissioner upon review of the record before him. Therefore, he believes it necessary to provide a copy of this decision *** to the Attorney General and County Prosecutor for prosecutorial consideration. As stated by the Commissioner in In the Matter of the Annual School Election Held in the Township of Dover, a Constituent District of the Toms River Regional School District, 1967 S.L.D. 52, 54, partisan politics have no place in school district elections.
>
> ***Union City is strongly cautioned to heed the words of the Appellate Division in Botkin v. Westwood, 52 N.J. Super. 416 (App. Div. 1958) which states
>
>> ***The aim is clear that the local school system shall be run by the citizens through their elected representatives on the board of education and not by political parties and that the elections of board members shall be on the basis of educational issues and not partisan considerations.*** (emphasis supplied) (at 431)
>
> (Slip Opinion, at pp. 21-22)

Concerning the merits of the instant matter, that is, whether the Board violated petitioner's rights under the First and Fourteenth Amendments to the U.S. Constitution and under Article One, paragraphs 1 and 6 of the New Jersey Constitution in refusing to rehire him in 1987 as Head Football Coach at Emerson High School in retaliation for his participation in political efforts in the April 1987 Board election, the Commissioner finds no basis in the record upon which to reverse the ALJ on any finding of fact related to the testimony of the witnesses at the hearing below. Accordingly, the Commissioner adopts as his own those findings of the ALJ below upon which he based his conclusion that "the Board's vote and decision not to hire Mr. Caputo for the 1987 season did result from the unlawful motive of purging Mr. Caputo solely because he exercised his constitutional rights of speech and assembly.***" (Initial Decision, ante)

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Concerning petitioner's exception regarding reinstatement, the Commissioner concurs with the ALJ that to restore petitioner at this time to his position as Head Football Coach for the 1987 season with fall practice about to commence would be disruptive for pupils and team members alike. However, since the ALJ has concluded, and the Commissioner concurs, that petitioner was not offered his position as Head Football Coach for proscribed reasons, he cannot be denied the right to serve in that capacity from which he was unconstitutionally barred.

Based upon the above determination, the Commissioner hereby directs the Board to meet immediately with petitioner to review the situation and to reach a determination as to whether immediate restoration of Mr. Caputo to his rightful position as Head Football Coach at Emerson High School is indeed impractical or disruptive to the students. If the Board is able to conclude that no harm will accrue to the interests of the students involved as a consequence of this late-dated restoration, Mr. Caputo is to be immediately restored to the position of Head Coach - Football at Emerson High School for the 1988-89 school year. In addition, the Board shall pay him the $2,800 coaching stipend he would have received for the 1987 season.

If, however, the Board should determine that Mr. Caputo's immediate restoration would work hardship on the interests of the students involved, then Mr. Caputo is to be compensated monetarily with the appropriate coaching stipend for both the 1987-88 and the 1988-89 seasons for the Board's failure to restore him to the position the Commissioner herein has deemed to have been impermissibly denied him. In the event that the determination is made to compensate Mr. Caputo for the 1988-89 school year rather than to restore him, then he is to be restored to the position of Head Coach - Football, Emerson High School for the 1989-90 football season. While the Board is not proscribed from exercising its legal right to make all future determinations beyond 1989 relative to employment of petitioner as Head Football Coach, the Board is admonished that any such determination may be made only for such reasons that will withstand careful scrutiny.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed in the initial decision as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 8, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7258-87

AGENCY DKT. NO. 311-10/87

PLUMSTED TOWNSHIP BUS DRIVERS ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Wayne J. Oppito, Esq., for respondent

Record Closed: May 31, 1988 Decided: July 13, 1988

BEFORE **BRUCE R. CAMPBELL, ALJ:**

The Plumsted Township Bus Drivers Association (petitioner) challenges the validity of a contract for certain pupil transportation bus routes awarded by the respondent Plumsted Township Board of Education (Board) to Eagle-Wolfington Leasing Corporation.

PROCEDURAL HISTORY

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The Honorable Lillard E. Law, ALJ, conducted a prehearing conference by telephone on January 5, 1988, at which procedures and issues were settled.

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One matter raised at the conference was whether the petitioner had standing to bring the action. The parties submitted briefs and on March 29, 1988, Judge Law issued an order deciding the petitioner had standing and directing the matter to proceed to plenary hearing. The matter was transferred to me and was heard on April 13, 1988, at the Office of Administrative Law, Quakerbridge Plaza, Trenton. The parties filed posthearing submissions and the record closed on May 31, 1988.

STATEMENT OF THE CASE

The petitioner alleges that the contract the Board awarded to Eagle-Wolfington was unlawful. The contract was not awarded to the lowest possible responsible bidder. In addition, the Board met with one bidder and made substantial changes to specifications outside of the bidding process. This meeting was ultra vires. The bus drivers seek to be made whole; that is, they seek back pay and all replaceable fringe benefits.

The Board asserts that all legal requirements in connection with the contract were met. The lowest responsible bidder received the contract. Each bidder had an equal opportunity. Even if there were a violation, the only remedy the Association can get would be a declaration that the contract is null and void. If the contract is declared null and void, the matter is virtually moot because the 1988-89 bids have been sent out.

RELEVANT EVIDENCE

The Board president testified concerning the labor contract between the petitioner and the Board (P-19). He also testified concerning the Board's resolve to solicit bids from outside contractors to provide pupil transportation. He testified in great detail concerning the advertising, bidding and award process.

Three vendors, Anderson, Hiltbrunner and Eagle-Wolfington, submitted bids. The Board reviewed bids on or about Monday, August 10, 1987. The only concern was not lowest cost. The Board looked at state aid figures, its own budget and other matters and tried to determine the most cost effective transportation scheme.

Because a local newspaper had raised a question about the safety of one bidder's equipment, the Board called all three vendors after the bids were opened. The Board first

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contacted Anderson. His prices were much higher than the other bids. Anderson supplied his reasons and assured the safety of his equipment.

The Board next called Hiltbrunner. The Board representative who placed the telephone call did not go into detail, but expressed concern about safety problems. Hiltbrunner did not want to go into detail during that discussion. He said he would call back, but did not do so.

The Board last spoke to Eagle-Wolfington. They discussed safety issues and spoke about drivers who would be reduced in force. Neither Eagle-Wolfington nor the Board wanted to go to the Board meeting at which the contract would be awarded "with a bunch of problems outstanding."

At the Board meeting of August 24, the Board distributed copies of its transportation analysis and recommendations (P-9). Item 15 under the recommendations heading details discussions with Eagle-Wolfington representatives, specifies all things that Eagle-Wolfington agreed to provide and specifies the exact routes included in Eagle-Wolfington's bid. The witness stated the Board had recommended keeping kindergarten routes and contracting out all or nearly all other routes.

There was testimony concerning how kindergarten routes could be more efficiently and less expensively operated and how low enrollments at the high school led to the elimination of one route. Although these changes were implied in the analysis (P-9), they were not discusssed with any of the bidders.

At a meeting between the Board and Eagle-Wolfington, the bidder was not aware of possible changes of routes. The Board wanted to know about safety, whether Eagle-Wolfington would hire some of the Board's former drivers and how Eagle-Wolfington would relate with the Board's transportation coordinator. The parties did not go into options at that time because the Board had not yet worked out the possibilities. The Board did not know at that point which bidder, if any, it would select. The Board did not know at that point it would eliminate one high school route.

The Board considered various nine-month and 10-month costs, any possible discounts that bidders would give and other variables. All bidders knew that the contracts

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were subject to adjustment based on beginning of the year enrollments. The contract ultimately was awarded on September 24. The Board was aware of its statutory obligation to let unsuccessful bidders appear for an informal hearing. The superintendent of schools advised Hiltbrunner and Anderson that they were not successful bidders.

The witness also testified that the district had decided in June 1987 to study the feasibility of contracting out some or all of its pupil transportation. Almost immediately the Board received expressions of concern with safety. The Board also advised its drivers of its investigation. One driver advised the Board president of safety problems associated with one contractor in the area. In addition to other comments, the Board became aware of an incident reported in the Asbury Park Press that occurred in Tinton Falls.

Although the contractor involved did submit a bid, the Board did not select him. He was given a chance to respond to the safety concerns but did not. Because of this bidder's failure to provide safety assurances, and his failure to reply to other Board concerns, his bid, although low, was rejected.

Eagle-Wolfington was awarded the contract. Some routes were modified, based on enrollment, and therefore differed from those advertised. However, all bidders knew that routes were subject to adjustment based on enrollments.

The superintendent of schools testified similarly to the Board president. He conducted the investigation and analysis that led to creation of exhibit P-9. He was present at the bid opening. There were no conversations with any contractors after the opening. He personally called each contractor a week before the bids were submitted and reminded them that the bids had to be constructed in such a way that routes could be added or deleted based on September enrollments.

The bids were given to the Board's transportation committee. They studied the bids and made recommendations to whole Board. The transportation committee went over the analysis and recommendations (P-9) with the whole Board in great detail. Although Hiltbrunner had had testimonial letters submitted on his behalf, the superintendent did not contact those persons. However, he contacted administrators in three districts that had been served by Hiltbrunner. In consideration of all information received and Hiltbrunner's

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failure to respond to the Board, the Hiltbrunner bid was rejected. In the superintendent's opinion, Eagle-Wolfington was the lowest responsible bidder.

Jane M. Jellison testified that she has driven for Eagle-Wolfington since October 1, 1987. She was employed by the Plumsted Township Board of Education for the eight years prior to that and served as president of the Bus Drivers Association for four years. She learned in late June 1987 that the Board was investigating the possibility of contracting pupil transportation services. She circulated a petition opposing any contracting. As a result of the award of transportation contracts to Eagle-Wolfington, there was a reduction in force (RIF).

The witness acknowledged receipt of a notice from the superintendent dated August 25, 1987, that the Board had approved contracting pupil transportation (P-8). The witness and five other drivers were RIFed as a result of the contract award.

THE PARTIES' ARGUMENTS

The petitioner asserts that neither Anderson nor Hiltbrunner was advised that kindergarten routes were to be eliminated and one high school run was to be eliminated. The petitioner also asserts that the Board failed to grant Hiltbrunner, as the lowest bidder, a meeting to explain why Hiltbrunner's bid had been rejected. Notwithstanding the prescriptions of the invitation requiring that references be supplied, Eagle-Wolfington failed to include any such information in its bid summary packet. The Board never formally approved the preparation of an invitation to bid nor did it approve the bid specifications. The Board failed to supply the county superintendent of schools with required materials prior to September 1, 1987 (P-7). Six district bus drivers lost employment as a result of the Board's decision to contract out certain bus routes.

The public school contracts law, N.J.S.A. 18A:18A-1 et seq., provides for contracting of transportation services. The statutes and related regulations pertaining to the bidding process are intended to encourage free and intelligent competitive bidding. Absent strict compliance with statutory and administrative prescriptions, the objectives of the local public contracts law and the parallel Title 18A statutes would be ignored.

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In the present case, the Board complied with virtually none of the provisions of statute and regulation. Nothing in the record shows the Board complied with N.J.A.C. 6:21-13.1 which requires the specifications must be approved and the advertisement for bids must be authorized by formal action of the Board.

The Board does not challenge the fact that Hiltbrunner's bids were lowest in terms of dollars. Nevertheless, the Board engaged in fact-finding without the benefit of a public hearing and concluded there were concerns with Hiltbrunner's safety record. On that basis, it rejected Hiltbrunner's bid as not representing a responsible bid. N.J.A.C. 6:21-16.5(d) and (e) require a board to offer a hearing to lowest bidder when the lowest bid is rejected. The regulations specify what does and does not justify rejection of the bid.

The Board, through two designated members, met with a representative of Eagle-Wolfington on August 18, 1987. Several changes were made in the bid specifications contained in the invitation to bid. All kindergarten runs were eliminated from consideration. One high school run also was eliminated. Based on the Board's own study (P-9), the Board's representatives and Eagle-Wolfington's representatives agreed to eliminate the routes served by bus number six.

Despite the many changes, the Board failed to go through the entire bidding process again. No Anderson or Hiltbrunner representative was advised of the meeting that took place on August 18. As a result of this bilateral meeting, Eagle-Wolfington modified its bid by more than $30,000 and, among other things, offered a four percent discount, not the five percent discount specified in its original bid, notwithstanding the failure of the Board to award all of the routes initially set out in the invitation to bid.

N.J.A.C. 6:21-15.29(c) makes it clear that the purpose of bidding is to prevent fraud, favoritism and extravagance. N.J.A.C. 6:21-15.5(b) forbids a board to impose new conditions or to allow bidders to change bids or make oral bids after they are opened. Specifications may not be modified after bids have been received and the contract awarded to one of the bidders upon revised specifications.

N.J.A.C. 6:21-16.5(a) and (b) provide that the contract be awarded to the lowest responsible bidder by formal action of the board of education in a public meeting. No Board is authorized to delegate its power to enter into a transportation contract. Any

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award must be according to the terms advertised to prospective bidders. The petitioner contends that the Board violated all of these regulations.

The Board's conduct cannot be condoned because of any ignorance of the law. The only appropriate remedy, given the illegal contracting, is to order the reinstatement of all district bus drivers who lost employment with the provision that these bus drivers be made whole for any lost income, fringe benefits and other emoluments as a result of the Board's conduct.

School law decisions consistently conclude that there must be strict compliance with the prescriptions of regulations regarding contract processes. In Coaches of Eight, Inc. v. Lakehurst Bd. of Ed., 1978 S.L.D. 416, the Commissioner determined that failure to use the appropriate forms required by N.J.A.C. 6:21-16.2 represents a ground for the disapproval of a proposed pupil transportation contract. In Wall Tp. Bd. of Ed. v. Bureau of Pupil Trans., 1976 S.L.D. 643, the Commissioner concluded that a local board of education could not be excused from responsibility in resubmitting transportation contracts for bids through the use of emergency provisions. The Commissioner in Wall Tp. held as follows:

> Competitive bidding is designed to obtain the best economic result for the public. Greenburg v. Fornicola, 37 N.J. 1, 6 (1962) Its paramount aim is to assure that all bidders bid upon the same thing, and that the public knows clearly what the bidder must give and the municipality receive, for a plainly stated consideration. Belousofsky v. Board of Education of City of Linden et al., 54 N.J. Super. 219, 223 (App. Div. 1959) In this manner the bidding laws can protect the public interest by keeping costs at a minimum and by preventing fraud. Board of Education of Asbury Park v. Hock, 38 N.J. 213, 231 (1962)

In conclusion, the petitioner asserts that the Board's noncompliance with relevant statutes and regulations justifies the relief it seeks.

The Board argues it acted in all ways consistent with the applicable statutes and regulations. The petitioner says the Board permitted the successful bidder to alter its bid after the bids were received. This is not true. Routes were changed. However, reviewing the regulations and the invitation to bid (P-1) it becomes clear that the Board acted within its authority. N.J.A.C. 6:21-13.2(a) specifically states, ". . . The board of

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education reserves the right, with the approval of the county superintendent, to change the route. If any change of route results in increased or decreased mileage, adjustment in the contract price will be made accordingly."

The invitation to bid (P-1) states, "The Board of Education reserves the right to reject any and all bids and to waive any informalities in the bids if that is in the best interst of the school district." The document also states:

> Copies of the 1987-88 bus routes are attached, together with times and mileages for each route, and school times for 1987-88 as far as is known. Changes in routes are to be approved in all cases by the Plumsted Township Board of Education or their designated representative, and deviating from established routes may only occur after such approval and after allowing adequate time for notifying parents of students involved in the change. Board of Education reserves the right to require changes if needed.

The Board urges that what the petitioner alleges violates the statute was the Board's decision to eliminate one bus route entirely and to continue transporting the kindergarten pupils in-district. The real issue is whether all bidders had the same opportunity to bid on the contract. The courts have stated many times that the major objective of all public bidding statutes is to promote the honesty and integrity of the bidding and the system itself. See, e.g., Keyes Martin and Company v. Director, Div. of Purchase, 99 N.J. 244, 256 (1985).

The Appellate Division dealt with the matter of an irregularity in a public bid in Bryan Construction Co., Inc. v. Bd. of Trustees, 31 N.J. Super. 200, 206 (App. Div. 1954). The court stated:

> Further, a municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and perfunctory role. It has inherent discretionary power, and what is more, a duty to secure, through competitive bidding, the lowest responsible offer, and to effectuate that accomplishment it may waive minor irregularities.

The court went on to define the nature of permitted irregularity by citing Phifer v. City of Bayonne, 105 N.J.L. 524, 527 (Sup. Ct. 1929):

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> It is not any kind of irregularity in specifications of proposed public work to be done that will have the effect of voiding the award. The irregularity must be of a substantial nature — such as will operate to affect fair and competitive bidding.

The Board urges that applying the facts in this matter to the above law, it is plain that the Board's actions did not violate statute, regulation, or case law. Consistent with law and regulation, the contract changes and route changes were approved by the county superintendent of schools.

The Board's transportation committee met with Eagle-Wolfington representatives on August 18, 1987. The Board had not previously used out-of-district transportation. It was concerned with pupil safety. The Board had numerous reports and newspaper accounts concerning the safety record of one of the bidders. It wanted assurances from Eagle-Wolfington of its safety record. Both Weatherford and Gambacorta testified in this regard and their testimony is uncontroverted.

In no way did the Board strike a deal with Eagle-Wolfington. During the course of the meeting with Eagle-Wolfington, the transportation committee cleared up a question concerning the bid. The superintendent testified that he spoke to each bidder prior to the submission of bids and told all that the Board might or might not choose to contract busing or the Board might decide on a combination of in-district and contract busing. It was therefore necessary to prepare bids in such a way that the Board could select certain routes and exclude others. This is how the bids were prepared (P-3, P-4, P-5). However, in the Eagle-Wolfington bid, the bidder indicated it would give a five percent discount if the entire package were awarded. The transportation committee asked for clarification if the Board only contracted for some of the routes. Eagle-Wolfington stated that the discount would be four percent. This cannot be construed as "cutting a deal."

Following that meeting, the transportation committee made a recommendation to the Board (P-9). This report was given to the public at the August 24, 1987 meeting of the Board, at which the petitioner's representatives were present. If the Board were going to do something secretly, it would not have provided this document to all persons present. The Board simply was not acting in a covert manner.

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The transportation committee made 15 recommendations concerning busing. One recommendation was to award the contract to Eagle-Wolfington. Again, the safety factor was a strong consideration. Moreover, because it was nearly time to open school, the bus routes were finalized. All bidders bid on the 1986-87 routes (P-1). All bidders knew that the routes were subject to change and that the Board might award all, some or no routes to the successful bidder. All bidders had the same opportunity and were given the same information, according to the testimony.

Upon consideration of the transportation committee's recommendations, the Board contracted certain routes and kept others in-district, including all kindergarten routes. Weatherford testified that no bidder, including Eagle-Wolfington, knew what the recommendation would be. The Board made its determination on the information it had. The information was not arbitrary, capricious or unreasonable and the petitioner has not proved the contrary. If there were any informalities, which the Board does not concede, the Board reserved the right to waive them and all bidders were aware of this (P-1). If there were any irregularities, they hardly rose to a level that would void the contract. Bryan, above. No Board action affected fair and competitive bidding. All bidders had the same opportunity and the Board then acted in the best interest of the school district, using its statutorily invested discretion.

The Board awarded the contract to the lowest responsible bidder in accordance with N.J.S.A. 18A:39-03. The bidder proposing the lowest dollar figure is not necessarily the lowest responsible bidder. If such were the case, the statute would simply read that the contract be awarded to the lowest bidder. The decision to determine who is the lowest responsible bidder must be made by the Board of Education. In any review of the Board's decision, the court must apply the normal administrative law standard and not reverse that decision unless the record reveals that it was arbitrary, capricious or unreasonable. Dougherty v. Human Service Dept., 91 N.J. 1,6 (1982).

In the present case, the Board determined that the Eagle-Wolfington Corporation was the lowest responsible bidder. The record does not reveal that this decision was in any manner arbitrary, capricious or unreasonable. The record shows that this was a prudent, rational and reasonable decision. From the outset of its investigation into contract busing, in addition to its financial and economic concerns, the Board's chief concern was the safety of the children to be transported. The Board received bids from

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three companies. One was Hiltbrunner. As the superintendent testified, Hiltbrunner had been the subject of several newspaper articles. One of its buses had caught fire. As a result, a State investigatory team found the company to be in violation of a number of regulations and removed some of its buses from the road. The superintendent also contacted superintendents in other districts, all of which had used Hiltbrunner and none of which Hiltbrunner had listed as references. The Board asserts that this factor alone, the failure to reveal those districts, made Hiltbrunner's bid nonconforming.

In addition, the Board received information from members of the community and from its own bus drivers, who drove for Hiltbrunner during the summer, concerning the poor condition of buses and "bounced" paychecks. As a result of all this information, the Board president testified that he contacted Mr. Hiltbrunner and discussed these concerns. He offered to meet with Hiltbrunner to work out any problems before the Board acted to award a contract. Hiltbrunner never responded. Furthermore, the superintendent spoke to Hiltbrunner to inform him the contract was awarded to Eagle-Wolfington. Again, Hiltbrunner made no response.

Under these circumstances, the Board can rightfully presume that the bidder has waived his right to a hearing. It must be noted also that Hiltbrunner has not challenged the Board's decision to award the contract to another bidder.

Portions of the August 24, 1987 Board minutes (P-11) clearly indicate that the Board properly awarded the contract to the lowest responsible bidder. The minutes of the meeting reveal that the Board investigated all concerns in this area. The meeting was a public hearing on all concerns. The fact that one bidder did not respond to an opportunity to participate does not make the meeting less public. At the conclusion of the public hearing on this matter, the Board awarded the contract to the lowest responsible bidder. The petitioner has not proved that the decision of the Board was arbitrary, capricious or unreasonable. The Board's decision must be sustained.

The petitioner seeks as a remedy reinstatement of all of the district bus drivers who lost employment with the provision that these drivers be awarded damages for any lost income, fringe benefits and other emoluments of employment. There is nothing in law permitting such a remedy and a great deal not allowing it.

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N.J.S.A. 18A:39-2 specifically allows a board of education to transport students by contracting for such services. The Plumsted Board is statutorily authorized to enter into a transportation contract and it did so. Older buses have been sold and are no longer available to the district for transporting pupils.

In M.A. Stephen Const. Co. v. Borough of Rumson, 125 N.J. 67 (App. Div. 1973), certif. den. 64 N.J. 315 (1973), the court held that the rejection of a bid for a public contract, even if such rejection was in violation of the bidding laws, did not render the public body liable in damages to the bidder, whether for loss of profits, increased cost of performance, cost of preparing and submitting the bid, or for other alleged consequential losses. The court specifically states at 125 N.J. Super. 74:

> It is true that, as the contractor-plaintiffs point out, a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him, McGovern v. Trenton, 60 N.J.L. 402 (Sup. Ct. 1897). But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. If was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.

Accord, AZ Transportation Inc. v. Bd. of Ed. of Woodbridge Tp., 1976 S.L.D. 561.

The petitioner cannot assert individual claims for damages since none of the individuals themselves were joined as parties. In N.J.E.A. v. Essex Cty. Educational Services Comm., 5 N.J.A.R. 29 (1981), the case relied upon by Judge Law in granting petitioner standing, individuals not joined as parties could not assert individual claims for damages. The well-established rule is that damages are not awarded as a result of violations of the statutes requiring bidding for public work contracts. As the Supreme Court noted in Terminal Const. Corp. v. Atlantic City Sewerage Auth., 67 N.J. 403, 409-410 (1975), the bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good.

The only remedy available to the petitioner is an order declaring the contract with Eagle-Wolfington null and void and that remedy is moot. An unsuccessful bidder can

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have a court compel the awarding of the contract to it. In the instant matter, the adminsitrative law judge could find the award of the contract null and void and order a return to the status quo. This result would be difficult because the Board has sold the buses that would be needed to return to full in-district busing. Furthermore, absent any authority to award monetary damages, a finding that the award of the contract to Eagle-Wolfington was improper is moot because the contract will have expired prior to the Commissioner of Education final decision in this matter.

For the all the foregoing reasons, the respondent Board urges that this judge find and determine that the Board acted consistently with its statutory authority in the award of the 1987-88 transportation contract. In the alternative, if the determination is that the Board's actions were ultra vires, the petitioner is not entitled to the remedy it seeks and the only available remedy of a declaration that the contract is null and void is moot.

DISCUSSION AND DETERMINATION

If the Legislature chooses to direct competitive bidding, as it has in the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., it need not mandate an award to the lowest responsible bidder but rather may vest in its agent the discretion to accept the bid of that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors being considered. Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471 (1971). "Whatever may be the specifics of the duty owing by a public official in a given case to the members of the public to accept the bid proposal which best serves the public interest, that duty by its very nature runs to the members of the public, and to them alone. It does not run to the bidders and does not create any right or rights in the bidders." Stephen, above, at 73-74.

Of course, it serves the public interest to permit suits to enforce competitive bidding statutes. A taxpayer may sue and a bidder who claims to be entitled to the award may sue. The low bidder is entitled to be heard by the public authority before his bid is rejected. "The point to be stressed is that the interest, whatever its dimensions, is conferred upon him to the end that the public will obtain all that is due it in the procurement processs, rather than for his individual aggrandizement. Kohl, above, at 479-480.

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In Commercial Corp. v. Sullivan, 47 N.J. 539 (1966), a low bidder brought suit to review the action of the State Director of Purchase in rejecting plaintiff's bid, under a statute that directed that the award should be made to the "responsible bidder whose bid...will be most advantageous to the State . . . ." The court there said:

> It should be noted that appellant quite properly makes no claim for damages based upon the allegedly improper failure to award it the contract. Submission of the lowest bid in answer to an advertisement for bids by the State for public work cannot be the basis of a claim for damages based upon the failure of refusal to accept such bid.... [at 546.]

To allow the lowest responsible bidder to recover damages not only would violate sound principles of law, it would also invert the policy and reasons that give rise to the obligation of public officials to accept the bid proposal which best serves the public interest. Stephen, above, at 75. The Stephen court also stated:

> Lastly, the contractor-plaintiffs suggest that just as "our Supreme Court abolished the obsolete, unjust and archaic idea of a state's sovereign immunity from suit upon an express contract," so should there be abolished "any concept that a wronged bidder should not receive monetary damages." Quite aside from the obvious fact that, in law, it is the public which is "wronged" and not the bidder, the two propositions are not equatable. . . .
>
> It is our conclusion, therefore, that neither of the contractor-plaintiffs is entitled to the recovery of any damages against the respective municipalities by reason of the rejection of their bids, even assuming such rejections to have been in violation of N.J.S.A. 40:50-1. [emphasis added.] [at 76.]

From the parol and documentary evidence, I FIND:

1. The Plumsted Township Board of Education advertised for bids on supplying school bus services for the 1987-88 school year, bids being receivable up to 1:30 p.m. prevailing time on August 7, 1987.

2. The Plumsted Board, through a transportation committe, collected data on contracted versus in-district busing. The transportation committee made its report on August 24, 1987.

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3. The Board or representatives of the Board spoke to all three bidders before bids were accepted concerning whether bidders could purchase the Board's buses, hire the Board's drivers and other matters.

4. Board agents called all three vendors after the bids were opened because of safety concerns.

5. The Board called bidder Anderson first. Although his quotation was much higher than the other two, his assurances concerning safety matters were adequate.

6. Agents next contacted bidder Hiltbrunner. Hiltbrunner did not want to go into detail concerning safety matters. He said he would return the telephone call, but did not.

7. Board agents spoke to Eagle-Wolfington. In addition to safety issues, they discussed the district employees who would be RIFed. Eagle-Wolfington did not want to enter discussions or a contract with a "bunch of problems outstanding."

8. The Board met on August 24, 1987, and studied the transportation report.

9. The Board determined to eliminate certain routes and to make other changes to increase efficiency and lessen cost.

10. During the postbid discussion with Eagle-Wolfington, Eagle-Wolfington did not know of possible route changes and did not know which bidder, if any, the Board would select.

11. All bidders knew that route changes might be effected by September enrollment figures.

12. The Board and its agents spent most of September gathering information about safety concerns and making final route designations.

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13. The contract was awarded to Eagle-Wolfington on or about September 28, 1987.

14. The superintendent advised the two unsuccessful bidders of the award to Eagle-Wolfington. Neither requested a hearing.

In addition to the foregoing, it also appears that the Board failed to approve formally the preparation of an invitation to bid and failed to approve formally the bid specifications. I can make no determination from the record whether the Board supplied the county superintendent of schools with required information concerning pupil transportation under N.J.A.C. 6:21-16.1 prior to September 1, 1987.

What the case comes down to, then, is a situation in which a board exercised authority given to it by the Legislature, but failed to honor certain procedural requirements. In such circumstances, the cases discussed above instruct that the procedural deficiencies may not be overlooked but neither may they be the basis for voiding the subject contract. And even if the contract were voided, no damages would accrue to the petitioner under Stephen, above.

The Plumsted Township Board of Education must be reminded that strict adherence to both statute and administrative code is not the maximum, but the minimum expected of the Board in all of its affairs. I disagree with the petitioner that Winston v. Bd. Ed. So. Plainfield, 125 N.J. Super. 131 (App. Div. 1973), gives the petitioner the foot in the door it claims. That matter and this stand on quite different footings. Winston does state that if a dispute is grievable under a collective bargaining agreement, an exclusive employee representative has both a right and a duty to process the grievance. In the present matter, however, the instruction in Stephen, cited above, controls. And if Stephen were not dispositive, N.J.E.A. v. Essex Cty. Educational Services Comm., above, is. Employee organizations lack the standing to assert individual claims for damage which any or all of their members might have unless the individuals themselves are joined as parties.

It is well established that damages are not awarded as the result of violations of the statutes requiring bidding for public work contracts. Terminal Const. Corp., above.

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The bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. This is what allows rejection of a low bid.

In consideration of the foregoing, I **CONCLUDE** that there is no relief to which the petitioners are entitled. Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

13 JULY 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7-14-88
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 19 1988
DATE

Ronald J. Parker
OFFICE OF ADMINISTRATIVE LAW

ds

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PLUMSTED TOWNSHIP BUS DRIVERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner's four exceptions are summarized, in pertinent part, below:

> THE ADMINISTRATIVE LAW JUDGE CLEARLY ERRED IN DISMISSING THE INSTANT PETITION OF APPEAL, WHEN THE ADMINISTRATIVE LAW JUDGE CONCLUDED THAT THE BOARD OF EDUCATION VIOLATED NUMEROUS PRESCRIPTIONS OF THE ADMINISTRATIVE REGULATIONS GOVERNING THE CONTRACTING OUT OF TRANSPORTATION SERVICES

Petitioner argues that although the ALJ concluded that the Board had failed to approve formally the preparation of an Invitation to Bid and had failed to approve formally the bid specification and, "moreover, 'failed to honor certain procedural requirements,'" (Petitioner's Exceptions, at p. 3) he dismissed the petition, notwithstanding the violation of the cited procedural and substantive provisions of the pertinent regulations. Petitioner claims that "a Petition of Appeal cannot be dismissed solely because an [ALJ] disagrees with one component of the remedy sought in a particular case, i.e., that component of the remedy sought in this matter that would have awarded individual damages and the reinstatement of the adversely affected RIF'fed bus drivers." (Id., at pp. 3-4)

Petitioner avers that

> ***when an [ALJ] has determined that numerous procedural and substantive violations of apposite administrative regulations concerning the critically important public contract bidding process had been violated, a Petition of Appeal cannot be dismissed. (emphasis in text)
> (Id., at p. 4)

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Moreover, petitioner argues that assuming arguendo that the ALJ is found to be correct in concluding that reinstatement and a make whole remedy is inappropriate in this matter,

> the Commissioner of Education should not dismiss the Petition, but should determine, consistent with part of the prayer for relief, that the Plumsted Township Board of Education failed to comply with even the minimum procedural and substantive prerequisites specified in the above-cited administrative regulations concerning the contract bidding process -- facts which were found by the Administrative Law Judge in the above-entitled matter. (Id., at p. 2)

> THE ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO CONCLUDE THAT PERTINENT COMMISSIONER OF EDUCATION DECISIONS HAD DETERMINED THAT THERE MUST BE STRICT COMPLIANCE WITH ADMINISTRATIVE REGULATIONS THAT RELATE TO BIDDING PROCEDURES IN EFFECT FOR TRANSPORTATION SERVICES

In this regard, petitioner refers to Point Two of its post-hearing brief for a delineation of its contentions on this point. Said submission is incorporated herein by reference.

> THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING THAT THERE WAS NO BASIS FOR THE AWARD OF DAMAGES TO INDIVIDUAL DRIVERS IN THE INSTANT MATTER AND NO BASIS FOR THE REINSTATEMENT OF THE ADVERSELY AFFECTED DRIVERS

Petitioner refers to its reply letter memorandum dated May 26, 1988 with regard to this exception, which it is noted is incorporated herein by reference.

Petitioner claims that if the Plumsted Township Board of Education did not comply with the minimum procedural prerequisites delineated in regulation,

> that in order for this determination to be meaningful in this district and elsewhere in this State, there must be an effective remedy ordered that would encourage Boards of Education to honor procedural and substantive prerequisites concerning the transportation bidding process in the hope that situations that have arisen in Woodbridge, Plainfield and elsewhere in New Jersey can be avoided. (Id., at pp. 5-6)

Petitioner submits an effective remedy must be ordered in this matter, that is, the reinstatement of the affected bus drivers and the award of back pay to those adversely affected bus drivers.

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The Board's reply exceptions aver that the initial decision should be affirmed in its entirety. It claims the arguments of petitioner in its exceptions are the same ones made before the ALJ and rejected. It relies on its brief and the written decision of the ALJ for its reasons as to why the initial decision should be affirmed. Said post-hearing submission is incorporated herein by reference.

By way of cross-exception, the Board excepts to the finding of the ALJ that petitioner had standing to bring this matter, and relies again on its brief previously submitted as to the issue of standing.

Having carefully reviewed the record before him, the Commissioner is satisfied that the record of this matter clearly supports the findings and conclusion reached by the ALJ in the initial decision for the reasons set forth therein. Petitioner's exceptions provide no further proof that would persuade the Commissioner to hold otherwise.

As found by the ALJ, the petitioning Association may bring no claim on behalf of its membership who were riffed as a result of the Board's selecting the bid it did in August 1987 because none of the individuals were joined as parties. See N.J.E.A. et al. v. Essex Cty. Educational Services Comm. et al., 1981 S.L.D. 953, 959. Thus, petitioner's claim for damages in the form of reinstatement and back pay of certain of its members is not properly brought before the Commissioner and is hereby dismissed as being without merit.

The Commissioner further concurs with the ALJ that notwithstanding the fact that the Association lacks standing to bring a claim for damages because it did not name the individual members seeking restoration to the position from which they were riffed plus back pay and emoluments, the only other remedy available to the petitioner, that is, an order declaring the contract with Eagle-Wolfington to be null and void, is made moot by the fact that the contract in question has now expired. The Commissioner further agrees with the ALJ that the Association, as a matter of public policy, did have standing to bring a challenge to the legality of the bidding process at issue in the instant matter. See the Decision on Motion rendered by ALJ Lillard Law dated March 29, 1988 in the above-captioned matter. See also N.J.E.A. et al. v. Essex County Bd. Services Comm. et al., supra, at 960-61. However, as found by the ALJ, while the Board is to be admonished for its failure to comply with the strictures of the school bidding laws, a declaratory judgment or order finding that such violations did occur would still provide no relief available to the Commissioner to grant at this time since the contract in question has expired during the course of this litigation.

The Plumsted Township Board of Education is recognized herein as having violated the bidding procedures as embodied in statute and administrative code to the extent found in the initial decision herein. The Board is admonished that in the future it

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shall conform strictly with the requirements established by such laws and regulations. As noted by the ALJ "***strict adherence to both statute and administrative code is not the maximum, but the minimum expected of the Board in all of its affairs.***" (Initial Decision, ante)

With nothing new brought to the record by way of exceptions in response to the AlJ's findings and conclusions, the Commissioner adopts those determinations in the initial decision as his own. The instant Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

August 18, 1988

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prior to the annual school election. Petitioners allege that Council's actions were ultra vires wherein it instructed the Board that it would not fund a Board current expense budget in excess of the amount Council directed the Board to adopt before presenting the budget to the electorate. Petitioners allege that Council directed the Board to reduce the school budget to the amount Council finally approved before it was submitted to the voters, which included the reduction in force and which forms a basis for this litigation.

Council contends that the cause of action in the Second Count is that Borough Council exceeded its authority, and that its claimed ultra vires actions infringed on the independent province of the Board of Education. However, that claimed ultra vires activity, even if true, only happened to impact upon the Board of Education -- the problem itself was the unauthorized activity, which is not addressed by, nor subject to, the "school laws". It is not the happenstance of the identity of the injured party which determines the cause of action; rather, it is the nature of the act complained of. *Cinnaminson Twp. v. First Camden Nat. Bank & Trust Co.*, 99 N.J. Super. 115 (Chan. 1968). The Petitioners' claim herein is no different than any other claim of any other ultra vires act which might affect any other sort of property or interest. It is no different, for example, than if the Borough Council had engaged in an abuse of power in issuing a subpoena to someone who happened to be a teacher. In such a case, of course, the Commissioner of Education has no jurisdiction to consider the controversy, because the act complained of -- as distinguished from the fortuitous identity of the party upon whom it impacted -- is not a subject under the school laws. The Commissioner of Education is without jurisdiction to consider or redress claims of ultra vires acts of municipalities in a case such as this, even when the claimed act affects some aspect of a school. The remedy in any such case rests in a Court of general jurisdiction. *Board of Education of East Brunswick Twp. vs. Twp. Council of East Brunswick Twp.*, supra. Accordingly, it is respectfully submitted that the Second Count of this Petition must be dismissed for lack of jurisdiction. N.J.A.C. 6:24-1.9.

As to the First Count of the Petition, Council asserts that the relief requested exceeds the authority delegated by the Legislature to the Commissioner. Petitioners claim that the Board failed to meet standards set out in N.J.S.A. 18A:33-1 through 18A:35-1, et seq. The only specific remedy set forth therein is in 18A:33-2, relating to a failure of a school district to provide facilities and curriculum under

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the Institute for Occupational Studies in Morris Plains for vocational training at its expense from 1977 to 1979. Although she completed the program successfully, she was not granted a special education diploma because her placement was not by and through the Millburn school district. She has since experienced difficulty in matriculating at college level and/or securing employment for want of a high school diploma. In a petition of appeal filed against the Millburn Board of Education, the Department of Education and the State Board of Education, petitioners have alleged M.K. is entitled to a diploma for successful completion of her special education curriculum as issued by the Millburn Board and/or a diploma as issued by the Department of Education under GED procedures. Petitioners also sought judgment requiring respondent Millburn Board to pay the cost of tuition at Gramon School.[1] Respondents denied allegations of the complaint and any obligation to afford relief as demanded and raised affirmative defenses including relevant statutes of limitation and the bar of the doctrines of laches, waiver and estoppel.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 16, 1987. Answers by respondents were filed on October 9, 1987 and October 26, 1987. The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on November 2, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on January 15, 1988 and an order was entered establishing, inter alia, a hearing date on March 11, 1988. At request and/or with consent of the parties, the matter was adjourned until April 28, 1988.

The prehearing order provided that at issue were the following:

---

[1]The claim was abandoned and withdrawn by petitioners at hearing on April 28, 1988.

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A. Whether the Millburn Board had an ongoing obligation to petitioner M.K. to assure her an educational program completion of which would entitle her to a diploma;

B. If so, scope of relief for failure to fulfill the obligation;

C. Whether petitioner in fact has completed a course or courses of study that would entitle her to a diploma, and, if so, whether the Millburn Board should be ordered to award such diploma;

D. Whether the Department of Education under the circumstances has power or duty to issue petitioner a diploma under State and/or federal law;

E. If petitioner has not completed sufficient requirements for diploma under graduate equivalency standards, whether the State has power or duty to accommodate petitioner in her handicap and award an equivalency diploma; and

F. Sufficiency of affirmative defenses of statutory and/or regulatory time bars and/or bars of the doctrines of laches, waiver and estoppel.

The parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with documentation as necessary, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, unless there remained genuine, material, triable issues of fact, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision on pleadings, admissions, stipulations, documentation and memoranda of law, in accordance with N.J.A.C. 1:1-12.5 et seq. On April 25, 1988, respondent Millburn Board of Education filed a motion for involuntary dismissal of the petition and/or summary decision in its favor on two grounds: its defenses of the 90-day limitation rule of N.J.A.C. 6:24-1.2 and the equitable doctrine of

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laches. The motion was accompanied by certifications and memorandum of law. On April 27, 1988, the deputy attorney general on behalf of the Department of Education and State Board of Education joined in the motion. At hearing on April 28, 1988, the parties appeared and endorsed a stipulation of facts for purposes of consideration of respondents' motion. Thereafter, petitioners were given until May 9, 1988 to file a memorandum of law in opposition. The record on motion closed onJune 13, 1988.

ADMISSIONS, STIPULATIONS, DOCUMENTATION AND FINDINGS OF FACTS

The parties having so admitted and/or stipulated, I make the following **FINDINGS** of **FACT:**

1. M.K., whose date of birth is September 1, 1954, was a resident of Millburn, New Jersey, from time of birth until March 1984.

2. From September 1960 until June 1962, M.K. attended parochial school (St. Rose of Lima School).

3. M. K. attended the Short Hills School (an elementary school in the Millburn school district) on January 30 and 31, 1962 and February 5, 6, and 7, 1962. She did not attend classes in any other school operated by the Millburn school district on any other date.

4. On February 27, 1962, the principal of the Short Hills School, Frank F. Focht, wrote a letter to Mrs. W.K., mother of M.K., a copy of which is incorporated herein. The letter was received by Mrs. K.

5. Mr. and Mrs. K. unilaterally and voluntarily placed M.K. in a private school, the Gramon School, in Livingston, New Jersey, in February 1962.

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5A. At the time of placement, the Gramon School was not approved by the New Jersey Department of Education as a private school for handicapped children with learning disabilities such as those experienced by M.K. and was not so approved until 1974.

5C. At the time of placement neither the Gramon School (in 1962) nor the Institute of Occupational Studies (in 1977) had authority to award a diploma.

6. The Millburn Board of Education did not place M.K. at the Gramon School. The placement was made by the parents of M.K., at their expense, without prior notice to or the approval of the Millburn Board of Education.

6A. The Millburn Board of Education became aware of the placement at Gramon School in Spring of 1962. Because of paragraphs 5 and 6 above, the Milburn Board did not object to petitioner's placement.

7. The parents of M.K. maintained M.K. at the Gramon School at their own expense from September 1962 until June 1976, when M.K. was age 21 and she had successfully completed the course of study at the Gramon School. After reaching age 21, M.K. attended the Institute of Occupational Studies (IOS) in Morris Plains, New Jersey, in 1977, 1978 and 1979 and successfully completed the course of study at IOS.

8. The Millburn school district has refused to grant a diploma to M.K. The most recent request by petitioners to the Millburn school district for a diploma was on November 24, 1986. The superintendent of schools denied the request in December 1986.

9. The New Jersey Department of Education has refused to grant a diploma to M.K. for want of legal authority.

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10. The most recent request by petitioners (before suit) to the New Jersey Department of Education to award a diploma or to compel the Millburn Board of Education to award a diploma was made on December 22, 1986. The request was denied by letter of January 29, 1987 from Jeffrey Osowski, Director of the Division of Special Education of the Department of Education, to Herbert Hinkle, petitioner's attorney.

11. M.K. has never taken the GED.

13. The GED is a national test developed in Washington, D.C.

14. The State of New Jersey provides accommodations to handicapped individuals who want to take the GED in that the test can be taken in different formats (e.g. braille, audio, large print) or in a different time frame. No accommodations are provided a handicapped individual whose impairment prevents him or her from sufficiently mastering all of the subjects which a person must master to pass a standardized GED test. No alternative test instrument is provided and no adjustment in the passing score is made.

15. The passing score for the GED is set by the State and an applicant must meet the passing score to qualify for State issued high school diploma.

16. M.K. has not applied for a State-issued high school diploma pursuant to either N.J.A.C. 6:30-1.3(b) or N.J.A.C. 6:30-1.3(c).

17. The State issues only one type of diploma. The State does not issue a special education diploma.

20. In addition to the above statements, the following documents were included in the stipulation of facts:

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a) Letter of H. Raffel dated June 8, 1983 (Gramon approved by Department of Education in 1974)

b) Letter of P. Sweich dated May 18, 1983 (re IOS)

c) Letter of J. Osowski dated January 29, 1987

d) Letter of H. Hinkle, attorney, dated December 23, 1986

e) Letter of Division of Special Education to petitioners' attorney, dated January 24, 1987

DISCUSSION

As a preliminary matter, the petition of appeal deserves procedural analysis. It was filed in the Department of Education on September 16, 1987, and facially invoked the controversies and disputes jurisdiction of the Commissioner under N.J.S.A. 18A:6-9. Presumably, petitioners filed it after receipt of a letter from the Department's Division of Special Education on July 24, 1987, which referrred to an earlier petition for hearing filed in the Division on June 16, 1987, for a due process hearing under N.J.A.C. 6:28-2.7. The Division letter of July 24, 1987, informed that the due process petition "does not raise any issue concerning referral, evaluation, classification, educational placement, or provision of a free public education under N.J.A.C. 6:28-1.1 et seq." and suggested the refiling of a petition with the Commissioner under N.J.S.A. 18A:6-9. The June 16, 1987 petition, in turn, presumably followed a January 29, 1987 letter of the Director of the Division of Special Education that concluded that "since the local school district was not given responsibility for Ms. K.'s educational program, nor was an individualized education program (IEP) developed, Millburn is unable to award Ms. K. a secondary diploma by virtue of a successfully completed IEP, under N.J.A.C. 6:28-4.4(a)." The Director concluded the Department was unable to authorize the granting of a diploma under the circumstances described. Technically, therefore, if the Division letter of January 29, 1987, were said to be the act, order or ruling triggering the 90-day limiting period of N.J.A.C. 6:24-1.2, the

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actual filing of the present petition on September 16,1987, was presumptively untimely because more than some nine months later. The difficulty that looms is a difficulty in jurisdiction. Are the issues raised by the petition properly cognizable under the Commissioner's disputes resolution jurisdiction of N.J.S.A. 18A:6-9 or, instead, are such issues at least presumptively more properly cognizable as due process issues not soluble between the parties before the Division of Special Education and thus referrable to the Office of Administrative Law for due process hearing pursuant to N.J.A.C. 1:6A-1.1 et seq., which implements 20 U.S.C.A. 1514 et seq. and 34 C.F.R. 300 et seq.? If the jurisdiction of the OAL is under the Commissioner's referred disputes resolution jurisdiction of N.J.S.A. 18A:6-9, the limiting period is applicable. If not, and if the true essence of the matter is a due process issue, or form thereof, the limiting period is not applicable, yet the equitable limiting defense of laches may be. Cf. Holmdel Bd. of Ed. v. G.M., 6 N.J.A.R. 96 (OAL 1983), a tuition reimbursement claim in a due process hearing in which an administrative law judge recognized the defense generally but declined to apply it particularly in the action. Id., at 112-3.

It should be noted that the 90-day limiting period of N.J.A.C. 6:24-1.2 is, like other rules of the State Board of Education, subject to discretionary relaxation by the Commissioner under N.J.A.C. 6:24-1.17 in cases where strict adherence to it is inappropriate, unnecessary or may result in injustice. On balance, it is my view that despite the passage of more than 90 days between the Division letter of January 29, 1987, and institution of the petition of appeal on September 16, 1987, the passage of time appeared to have been occasioned by petitioners' search for an appropriate forum to voice their claims for relief. I sense no irremediable prejudice to parties respondent herein if the rigidity of the limiting period be relaxed so as to permit petitioner's claims to be addressed. Cf., Polaha v. Buena Reg. Sch. District, 212 N.J. Super. 628, 635 (App. Div. 1986). While such is my view concerning the regulatory limiting period, however, a review of the petition and stipulated facts suggests the limiting bar of the doctrine of laches generally is called in question.

The Millburn Board's motion is to dismiss the petition generally as for legal insufficiency and/or to dismiss the petition as barred by the doctrine of laches. The

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Department as respondent has joined in it. Respondents argued the applicability of the limiting bar of the 90-day rule and that it should not be relaxed; they argued the doctrine of laches was applicable because of petitioners' neglectful, unreasonable and inexplicable delay in assertion of their rights, which arose, if at all, as long ago as 1976 and would require evidence of events before then dating back as far as 1962.

Petitioners argued that validity of a defense on laches depends upon facts of the individual case, that respondents would not be economically prejudiced if petitioner's claims were to be addressed and resolved in their favor, that injustice to petitioners would result if their claims were not addressed, and that petitioner's accomplishments at her current level in view of disability raised a duty in respondents to accommodate the disability by affording the relief sought.

That the disabled petitioner is indeed facing dilemma as regulatory law presently appears is undoubted. She has not taken a GED test for an equivalency diploma under N.J.A.C. 6:30-1.3. She is not entitled to a secondary diploma from the school district responsible for her education upon completion of her individualized education program, having entered a presumably equivalent high school prior to September 1981, because she never had an individualized education program in the district under N.J.A.C. 6:28-3.6. Her diploma and graduation entitlement under N.J.A.C. 6:28-4.4(a) does not exist. Similarly, she presumably would also fail of entitlement to diploma and graduation under N.J.A.C. 6:28-4.4(b). But the dilemma she faces, it seems clear, is a dilemma petitioners visited upon themselves long ago in 1962 when petitioner was unilaterally (vis à vis the Millburn Board) and voluntarily placed in the Gramon School and, later, in the Institute of Occupational Studies in 1977, 1978 and 1979, as stipulated facts concede.

Although I recognize that petitioners' claims do not include one for tuition reimbursement at Gramon School and the Institute of Occupational Studies, and although the claim remaining is one for issuance of a district or state diploma, I am persuaded by the apposition in decisional law between tuition reimbursement claims and the diploma claim. Certainly, if the disabled petitioner had a right to an individual education program at the hands of the Millburn Board, she would, depending upon terms of the IEP, be

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entitled to placement, related services and, ultimately, the indicia of completion of the IEP in the form a special education diploma under N.J.A.C. 6:28-4.4. Denial of either form of entitlement would implicate due process rights. Even before enactment of the Education For All Handicapped Children Act, P.L. 94-142 (EAHCA), in 1975, claims on behalf of handicapped children for tuition reimbursement were denied to parents that caused voluntary placement without consultation with or consent by their local boards. Cases in New Jersey so saying are apposite here. Cf., T.E.E. v. Bd. of Ed. Tp. of Livingston, 1978 S.L.D. 754, aff'd, State Bd. (Feb. 7, 1979), 1979 S.L.D. ——; K.K. v. Bd. of Ed., Town of Westfield, 1973 S.L.D. 1086, 1973 S.L.D. 234; Rednor v. Bd. of Ed., City of Trenton, 1982 S.L.D. 10, OAL DKT. EDU 7371-81 (Sept. 3, 1982), aff'd, St. Board, 1983 S.L.D. —— (March 2, 1983); and Robinson v. Bd. of Ed. Boro of Runnenede, 1975 S.L.D. 6, 8-9. In Robinson, the Commissioner said he has consistently maintained that he would not order a board of education to pay for private school tuition and transportation unilaterally contracted for by a parent. In K.K., the Commissioner said:

> While parents have a right to sent their children to private schools, they do not have a right to require that public school districts pay the tuition cost involved. [K.K., at 240].

Here, the corollary inference from the tuition reimbursement cases where voluntary placement took place is that where parents voluntarily and unilaterally place their child privately without board consent, they do so at their peril, risking loss of their right to have the board develop an appropriate IEP with placement and conditions for completion thereof that would lead to issuance of diploma. Implicit justification for the inference are the concepts of waiver and, where the voluntary placement was long in the past, the bar of the doctrine of laches.

Laches involves "delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party." West Jersey Title and Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958). In Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 152-3 (1982), the court explained general principles of the defense:

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> The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs... The length of the delay alone or in conjunction with the other elements may result in laches... It is because a central issue is whether it is inequitable to permit the claim to be enforced, that generally the changing conditions or relations of the parties coupled with the passage of time becomes the primary determinant.

Petitioners argued (PB-8) that even though relevant actions date back to 1962, the issues are essentially whether Millburn had a duty to see petitioner was in a program capable of awarding a diploma or, alternatively, whether it should award a diploma to her for her accomplishments in 1976. They urged the remaining issues were all current: Does petitioner's current level of accomplishment warrant a diploma? Does her disability bar her from passing a GED, and, if so, is there a duty to accommodate her disability? At face value, those contentions as to the scope of issues would involve reconstruction of events that occurred more than 25 years ago, from witnesses and records that are unavailable now to respondents or nonexistent.

CONCLUSION

From the above, it is my conclusion that petitioners' claims are both stale and subject to bar by the doctrine of laches, as well as on their face the subject of voluntary relinquishment and waiver of rights to relief at the hands of the Millburn Board because of a voluntary unilateral private placement of the disabled petitioner without Board consent or consultation. Their actions in 1962 antedated any rights under N.J.A.C. 6:28-1.8 (after September 1983) affirmatively to be advised of their rights by the Board, as well as under N.J.A.C. 6:28-1.9 (prior to September 1983). Their actions in 1962 antedated enactment of the Education for All Handicapped Children Act and presently applicable New Jersey regulations under N.J.A.C. 6:28-1. The present petition is therefore both prejudicially untimely as well as legally insufficient under the doctrine of waiver. The petition is DISMISSED.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 13, 1988
DATE

JAMES A. OSPENSON, ALJ

JUL 18 1988
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 19 1988
DATE
js/md

FOR OFFICE OF ADMINISTRATIVE LAW

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M.K., W.K., AND J.K.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY, NEW JERSEY DEPARTMENT OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto, as well as primary exceptions to the initial decision.

In their exceptions petitioners recast the issues in this matter as follows: "[Do] Millburn and DOE have a legal responsibility toward M.K. regardless of the fact that her parents made a private placement at Gramon? *** Do Respondents have a legal responsibility to modify the G.E.D. process for a disabled person who because of her disability can never attain the level of proficiency required to pass a G.E.D. examination?***" (Exceptions, at pp. 1-2)

Petitioners except to the decision of the ALJ as follows:

1. Judge Ospenson erred in his application of the doctrine of laches to this case. Petitioners aver it is error to apply the doctrine of laches before a hearing on the merits of the case.

Relying on their brief, which is incorporated herein by reference, petitioners again posit their position that "[a]lthough 12 years have passed since M.K. finished the Gramon School the issue presented concerning Respondent's responsibility toward a pupil between 1962-76 is primarily a legal question, and the relief sought -- a diploma -- would not be burdensome for Respondents to implement should Petitioners prevail on the merits.***" (Id., at p. 3)

2. "The doctrine of laches is irrelevant to Petitioners' argument that Respondents have an affirmative obligation to modify the G.E.D. process to accommodate M.K.'s handicap.***" (Id.) Averring that M.K.'s handicap is current, petitioner argue that the ALJ erred in concluding that laches applies to this case because M.K.'s situation today is the result of her parents' action in 1962. They claim that the reason why M.K. is without a diploma is irrelevant to whether respondents have an affirmative legal obliga-

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tion not to discriminate against the handicapped. Petitioners again rely on their brief in support of their contention in this regard.

Petitioners submit the Commissioner should reject the decision of the ALJ, deny the motion to dismiss this action brought by respondents, and remand the case to OAL for a hearing on the merits.

The Board's exceptions agree with the ALJ's decision granting its motion to dismiss or in the alternative for summary decision. While the Board agrees with the ALJ's application of the doctrine of laches and his finding that dismissal was warranted, it disagrees with his interpretation of the 90-day rule, N.J.A.C. 6:24-1.2(b). The Board specifically disagrees with the ALJ's finding that relaxation of the rule is appropriate in this case.

The Board first addresses the initial basis the ALJ cited as justifying relaxation of N.J.A.C. 6:24-1.2, that is, that petitioners' delay in filing was caused by their "search for an appropriate forum***." See Initial Decision, at page 8. Relying on the Supreme Court of New Jersey decision in Bernards Tp. Ed. Ass'n v. Bernards Tp. Bd. of Ed., 79 N.J. 311 (1979), which stated that a search for an appropriate forum does not toll the Commissioner's 90-day rule, the Board avers that petitioners chose at their own risk to seek relief through the Division of Special Education, pursuant to N.J.A.C. 6:28, rather than directly from the Commissioner pursuant to N.J.S.A. 18A:6-9. "Since they chose to file a petition with the Division of Special Education first, and delayed filing the petition in this case for more than 90 days, they waived their right to be heard by the Commissioner." (Board's Exceptions, at p. 2)

As to the ALJ's second factor in relaxing the 90-day rule, that is, that "'no irremediable prejudice to parties respondent' would be caused by relaxation of the rule" (Board's Exceptions, at p. 1, quoting the Initial Decision, ante), the Board avows that "neither the Commissioner nor the courts have ever ruled that 'irremediable prejudice' to respondents must be shown in order to apply the 90-day rule.***" (Board's Exceptions, at p. 2) On the contrary, the Board contends, the Commissioner has held that the rule must be applied in every case "except where 'compelling circumstances' requiring relaxation can be shown." (Id.) It cites Ackerman et al. v. Bd. of Ed. of the Borough of Oakland, decided by the Commissioner August 25, 1986, in support of this contention.

The Board would distinguish the ALJ's reliance upon Polaha v. Buena Regional School District, 212 N.J. Super. 628, 635 (App. Div. 1986) in support of the "irremediable prejudice" standard upon which the ALJ relied. The Board avers Polaha offers no support for such a standard in that petitioners in the instant matter do not claim their delay in filing was caused by their effort to informally negotiate with respondents, which was the basis of the relaxation in Polaha. The Board argues petitioners "took no action, except the erroneous filing pursuant to N.J.A.C. 6:28, for nine months prior to filing the petition in this case." (Board's Exceptions, at p. 2)

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Petitioners' violation of the 90-day rule, the Board contends, should be another ground for dismissal of the petition.

The Board's reply exceptions first state that it maintains the decision of the ALJ should be adopted by the Commissioner with the modification discussed in its exceptions, above.

Further, the Board rebuts petitioners' argument that the doctrine of laches may not be applied before a full hearing on the merits. It argues that such a contention disregards the stipulation of facts jointly prepared and submitted in connection with the motion to dismiss. "The purpose of the stipulation, as agreed by all parties, was to obviate a hearing. Petitioners must not be heard to argue now that they should have been afforded a hearing." (Reply Exceptions, at p. 1)

The Board contends the facts to which the parties stipulated were sufficiently comprehensive to consider the doctrine of laches and for the ALJ to balance the equities of the case. "Moreover, he had enough before him to determine that a hearing on the merits would require reconstruction of events which occured (sic) more than 25 years ago. On the basis of that finding, the judge correctly ruled that the doctrine of laches required dismissal." (Id.)

As to petitioners' contention that "the reason why [M.K.] is without a diploma is irrelevant***" (Reply Exceptions, at p. 2, quoting Petitioners' Exceptions, at p. 3), the Board suggests that petitioners would have the Commissioner ignore the well-established legal doctrine of waiver. The Board avows the ALJ correctly analyzed this doctrine and its applicability to parents who unilaterally remove their handicapped children from the public schools. It suggests the Commissioner should adopt the ALJ's ruling and accordingly dismiss this case on the basis of waiver as well as laches and the 90-day limitations rule.

Upon his careful and independent review of the instant matter, the Commissioner adopts as his own the findings and conclusion of the Office of Administrative Law for the reasons expressed therein, except as pertains to the 90-day rule. In that regard, the Commissioner finds no basis for relaxation of N.J.A.C. 6:24-1.2 for the reasons expressed below.

Notwithstanding the fact that petitioners were represented by counsel, they erroneously filed an appeal with the Division of Special Education. The case law clearly establishes that the 90-day rule shall be strictly applied and compliance with N.J.A.C. 6:24-1.2 shall not be excused during the pendency of proceedings in other forums. See Bernards Tp. Bd. of Ed. Ass'n, supra, at 326-327, n. 4; see also Sara Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). The Commissioner finds nothing in the record to excuse petitioners' failure to file before the Commissioner either simultaneously with their appeal before the Division of Special Education, or within 90 days of January 29, 1987, the date when they were notified by the Director of the Division of

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Special Education that the requested diploma was denied. It would appear that, as was the case in Riely, having failed to acquire the relief sought in one forum, that is, Special Education, petitioners then sought further relief at the hands of the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. Inasmuch as petitioners did have the advice of counsel, the Commissioner is at a loss to explain petitioners' delinquency in timely filing before him. The Commissioner concurs with the Board's distinguishing Polaha, supra, from the instant matter, in that no informal negotiations with the Board or any other body which might justify relaxation of the strict timelines of N.J.A.C. 6:24-1.2 exist in the instant matter. Accordingly, he reverses that part of the initial decision which would relax the timelines required by N.J.A.C. 6:24-1.2(b) and finds that in this regard, too, petitioners' claim must fail.

Because the matter is dismissed for failure to meet the 90-day rule, the Commissioner need not reach the merits of the matter before him. However, based on the stipulation of facts of the parties, he finds no merit in petitioner's argument that the ALJ erred in applying the doctrine of laches before a hearing on the merits of the matter. As noted by the ALJ in the initial decision, ante, the parties submitted joint stipulations of fact toward resolving the six issues developed in the pre-hearing order on cross-motions for summary decision. Issue No. 6 speaks to the "[s]ufficiency of affirmative defenses of statutory and/or regulatory time bars and/or bars of the doctrines of laches, waiver and estoppel." See Initial Decision, ante. The record further indicates that the ALJ resolved the Board's Motion for Involuntary Dismissal of the Petition and/or Summary Decision in its favor based on the admissions, stipulations and documentation presented. See, Initial Decision wherein the ALJ stated "***a review of the petition and stipulated facts suggests the limiting bar of the doctrine of laches generally is called into question...." The Commissioner's review of the record and the initial decision satisfies him that sufficient facts were spread on the record to sustain the ALJ's conclusions concerning the doctrine of laches. See Initial Decision, ante.

Moreover, in reviewing the relief sought the Commissioner finds, as did the ALJ, that petitioners have advanced no statutory or other legal basis that would support the prayer for relief. Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law, which dismisses the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision as modified herein.

COMMISSIONER OF EDUCATION

August 24, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1398-88

AGENCY DKT. NO. 23-2/88

ELIZABETH WINTERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

George H. Buermann, Esq., for respondent (Harris, Dickson, Buermann, Camp, Ashenfelter & Boyd, attorneys)

Record Closed: July 6, 1988 Decided: July 13, 1988

BEFORE JAMES A OSPENSON, ALJ:

Elizabeth Winters, employed by the Board of Education of the Township of Verona, Essex County, as a member of its Child Study Team (she is an LTD/C), was involved in an automobile accident on November 10, 1987, while using her personal automobile on school-related business. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education, she alleged she sustained unreimbursed property damage costs and automobile rental expense that the Board refused to indemnify. She sought judgment against the Board for the sum of $341.63. The Board admitted petitioner's employment generally but denied responsibility for such reimbursement or indemnification, alleging that under the negotiated agreement in force in the district its sole responsibility to employees for voluntary personal use of their automobile was mileage of twenty-two cents when such usage was required and authorized

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by the superintendent. The petition was filed in the Department of Education on February 5, 1988. The Board answer was filed there on March 1, 1988. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on March 7, 1988, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on April 15, 1988, and an order was entered establishing, inter alia, a hearing date on June 6, 1988. The matter was heard and concluded in the Office of Administrative Law then. Thereafter, time for posthearing submissions having elapsed, the record closed.

At issue in the matter, as provided in the prehearing conference order, is whether petitioner shall have proven by a preponderance of the credible evidence the Board's liability for reimbursement and indemnification of petitioner's repair costs and rental expense flowing from voluntary use of her personal automobile on required Board business.

EVIDENCE AT HEARING

Essential facts in the matter were not in dispute. It readily appeared from testimony and stipulated documentation that petitioner Elizabeth Winters, a 25-year Board employee, has been employed for the 23 years as LTD/C and member of the district child study team. She is responsible in general for testing and diagnosing classifications of children referred to the child study team in association with other members of the team, in order to fashion individualized educational plans and thereafter to monitor them. Her duties require her to visit some six schools within the district and several special services schools out of the district in Bergen County. She uses her personal automobile to travel between her appointments. No reasonable or convenient other public transportation is available to her. No administrator has ever objected to use of her personal automobile; she is reimbursed for its use as required at the rate of twenty-two cents per mile and tolls. On November 10, 1987, while returning from an official

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appointment at Children's Specialized Hospital in Mountainside, she was involved in a two-car motor vehicle accident at about 10:30 a.m. At an intersection in the Township of Springfield, Union County, her automobile was struck at its right rear by a vehicle that petitioner said ran a red light. The vehicle did not stop; petitioner was unable to make an identification. She reported the accident to Springfield police (J-3).

Her automobile was a 1983 Datsun, for which her collision damage was insured under a $250 deductible policy with Travelers Insurance Company (J-2). Physical damage to her car was estimated and repaired by Town Auto Body, a registered automobile repair shop with Travelers Insurance Company. The cost was in excess of $2,000, which was reimbursed by the collision insurance carrier with the exception of the $250 deductible feature, which petitioner herself paid to Town Auto Body (J-4). She also rented a car for seven days from Agency Rent-A-Car at a total cost of $196.63, of which she was reimbursed $105 by the collision insurance carrier. She paid the balance of $91.63, suffering a total loss, as she claimed, of $341.63 (J-1, J-5, J-6).

Her claim in that amount was denied by the Board in due course.

That petitioner was on official school business at the time the accident occurred was confirmed by Daniel Bukowitz, Director, Special Services for the Board. He is director and school psychologist; he supervises activities of the child study team. His statement in confirmation to the Board superintendent is Exhibit J-11. He reported petitioner and another employee were assigned to attend an individualized education program (IEP) meeting at Children's Specialized Hospital, Mountainside, to meet with hospital staff to update an IEP on a Verona pre-school handicapped student. The accident occurred during her return. Bukowitz testified that he and others like petitioner are required to travel as part of their duties both in and out of the district and almost exclusively use their own personal automobiles, a practice that has been the case without objection by Board or administration over the years.

Thomas Sellitto, a deputy superintendent, testified he made inquiries concerning petitioner's claims for reimbursement, pursuing it with the Board's insurance carrier, Selective Risks, and its insurance agent. The Board carries no coverage for personal

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property loss suffered by Board employees using personal automobiles even if on official business. The Board thus rejected petitioner's claims, he said, which continued a long-standing practice not to pay for such losses. He conceded petitioner was on official school business at the time of her accident. Under Board practice, he said, authorized school employees using personal automobiles for official business are reimbursed only twenty-two cents per mile, in accordance with §19:4 of the agreement between the Verona Board and the Verona Education Association currently in force (J-12).

Sellitto believed that in his experience there have been numerous other instances when similar claims of other employees have been denied; he once had his own car damaged in a school parking lot by vandals but was denied reimbursement. Other teachers whose cars were damaged in parking lots within the district or elsewhere by vandals have never been reimbursed by the Board. Several teachers have requested such reimbursement, he said; all, however, were denied.

The above facts and circumstances having appeared in testimony and documentation to be without substantial dispute, I hereby adopt them as FINDINGS of FACT.

DISCUSSION

Analysis of the agreement between the Verona Board and the Verona Education Association for 1987-89 (J-12) showed several references to use of personal automobiles by employees. In 17:5, which covers custodians, maintenance personnel and grounds keepers, it is provided that use of cars by employees shall be voluntary. If an employee does use his/her car for authorized travel in performance of his/her duty, he/she shall be reimbursed at twenty-two cents per mile. In 19:4, which covers teachers and special services personnel like petitioner as LTD/C, it is provided that those who use their own automobiles in performance of their duties shall be reimbursed for all such travel at the rate of twenty-two cents per mile for all travel authorized by the superintendent.

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Here, the testimony established what seems to have been a regular practice by the Board to reimburse its employees voluntarily using their automobiles on official school business at the rate of twenty-two cents per mile but not further. As a corollary, evidence showed a regular past practice of the Board in declining to reimburse those employees whose personal property like automobiles has been damaged while their use is in furtherance of Board business. The inference is available, therefore, that Board reimbursement of employees at the rate of twenty-two cents per mile under past practice and as provided in the current negotiated agreement was intended by the contracting parties to limit Board liability beyond that amount, the theory being, presumably, that from the mileage reimbursement employees should themselves insure any risk of further loss or damage to their automobiles under appropriate collision insurance coverage or be self-insured to the extent of any deductibility feature. Generally speaking, one text-writer has said [3 C.J.S., Agency §321]:

> The contract of agency is determinative of the right of the agent to recover for expenditures incurred during the course of his agency. Accordingly, if an agent is authorized to perform an act for his principal and it is intended under the employment agreement that the agent will be reimbursed by the principal for the expenses incurred by the agent in carrying out the duties of his employment, the principal must reimburse the agent, but, if the provisions of the contract contain stipulations contrary to or inconsistent with reimbursement for advances and expenditures, the agent cannot recover therefor. The intent of the parties as determined by the terms of the contract between them control the right of a [principal] to be exonerated with respect to a loss incurred. The construction placed upon the contract by the parties themselves is important as showing their intention whether or not the agent should bear the expense of the agency. [Id., at 118-9].

It is my view that the negotiated agreement here limiting mileage reimbursement by the Board to employees for the use of their personal motor vehicles at twenty-two cents per mile represents, as acknowledged in past practice, the limit of Board liability and that, as a consequence, precludes petitioner from further recovery herein. She has acknowledged that she has been reimbursed for her mileage expense. I believe it is clear from the evidence that the intention of the parties in the present

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contract and under past practice is that employees utilize some part of their mileage reimbursement for the cost of appropriate full collision insurance coverage or, should that remain unfeasible, that they necessarily assume the risk of the sort of loss sustained by petitioner here. The option to utilize personal automobiles on school business is available only on that implied condition or limitation. Nowhere has it been suggested that employees like petitioner are required to use their own personal automobiles on school business or that they eschew available public transportation. Petitioner's argument that such alternative public transportation is not feasible suggests only that the issue is and will remain one for future negotiation. The risk must be differentiated, of course, from the risk of potential liability of the Board as principal for the acts of the employee as agent to third parties suffering personal injury or property damage from acts of the agent in the course of Board business. For that sort of liability, as appeared from testimony, the Board has been insured under general liability coverage. For injury arising out of and occurring during the course of emloyment, petitioner is covered by the Board's Workers' Compensation insurance policy and/or her own PIP coverage.

CONCLUSION

Based on the foregoing, I **CONCLUDE** the negotiated agreement in force between petitioner and the Board was not intended to create, and may not reasonably be construed and interpreted to imply, Board liability for indemnification of petitioner's automobile property damage loss not otherwise reimbursable under her personal automobile collision insurance policy, nor for consequential expenses for rental loss expense of a substitute vehicle, arising out of the accident of November 10, 1987 petitioner experienced while on official Board business. Absent any such express or implied obligation of reimbursement in the negotiated agreement, and consistently with past practice by the Board, petitioner's claims must be and are hereby **DENIED**. The petition of appeal is **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 13, 1988
DATE

JAMES A. OSPENSON, ALJ

JUL 18 1988
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

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ELIZABETH WINTERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and the initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner's exceptions iterate, almost verbatim, the post-hearing brief submitted to the ALJ. Such brief is incorporated herein by reference. Petitioner contends additionally that the ALJ improperly analyzed an alleged past practice of the Board denying reimbursement to other employees for property damage to employees' vehicles. This conclusion is erroneously based on the facts adduced at hearing, petitioner claims. She avows that none of the testimony elicited spoke to claims similar to the facts raised by her in support of her claim that the damage to her car was incurred by a hit-and-run driver and involved an automobile being used on school-related business at the time of the accident, as opposed to vandalism while an employee's car was parked on the school grounds.

Petitioner reiterates that the Board has not presented any valid reason for refusing payment. She claims her argument stems from

> a compelling need to balance the obligations between the parties. The Board requires her to travel as part of her job. The Board further requires the use of personal automobiles based on the lack of any other means of transport. Indeed, if the petitioner refused to travel or refused to use her auto, she would be subject to a claim of insubordination and open to disciplinary proceedings under N.J.S.A. 18A:6-10 et seq. or a withholding of increment under N.J.S.A. 18A:29-14. (Exceptions, at pp. 6-7)

Petitioner claims that under such condition the Board should be required to reimburse her for her expenses and that the Board's failure to provide reimbursement is purely arbitrary.

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She submits that the initial decision should be rejected and that she be awarded the relief requested.

Upon his careful and independent review of the record, the Commissioner affirms the dismissal of the instant matter for the reasons expressed below.

The Public Employment Relations Commission (N.J.S.A. 34:13A-1 et seq.) is the agency empowered to hear matters arising under public employees' contracts. Hence it is not appropriate for the Commissioner of Education to comment upon any arguments brought in this forum predicated on language in a collective bargaining contract, nor any argument related to past practice, a corollary issue related to collective agreements. To the extent that the ALJ reviews the contract language, the Commissioner, therefore, rejects the initial decision. Similarly, the Commissioner rejects the ALJ's analysis based on past practice in the district as a means of justifying the denial of reimbursement.

The Commissioner's assuming jurisdiction in the instant matter was based upon the petitioner's claim that the action of the Board herein was arbitrary and capricious in failing to reimburse her in the amount of $341.63 for property damage costs and automobile rental expense following a hit-and-run accident while she was performing school functions using her own vehicle.

Absent the contract claims, there remains pertinent to this issue only the Board witnesses' testimony offered as rebuttal to petitioner's claim of Board arbitrariness, suggesting that all claims for reimbursement in the district resulting from vandalism have been rejected by the Board. Without other presentations of facts, statutory or case law, the Commissioner finds that petitioner has failed to bear her burden of persuasion in bringing the instant petition before the Commissioner that the Board's action in denying such reimbursement was arbitrary, capricious or unreasonable. Accordingly, the recommended initial decision of the Office of Administrative Law is adopted insofar as it dismisses the instant Petition of Appeal, but for the reasons expressed herein, not those of the initial decision.

COMMISSIONER OF EDUCATION

August 24, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED CASES)

CHARLOTTE RUPAKUS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 6440-87
AGENCY DKT. NO. 279-8/87

GRACE A. COLLURA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 7943-87
AGENCY DKT. NO. 335-11/87

Kenneth I. Nowak, Esq., for petitioners
(Zazzali, Zazzali & Kroll, attorneys)

Stephen B. Hoskins, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: June 1, 1988 Decided: July 18, 1988

BEFORE EDITH KLINGER, ALJ:

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> prescribes for a teaching staff member to receive the full salary for their step on the district board of education's salary schedule.

As noted by the ALJ, case law has further clarified the definition of full time in the State Board of Education decision in Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, Middlesex County, decided January 7, 1987. Therein, as noted by the ALJ, the State Board decided that a full-time teacher is one who works the number of hours required by the Board for full-time employment. The State Board held on page 19:

> Accordingly, we conclude that the question of whether they were full-time teaching staff members during the relevant period requires a determination of whether they were employed for the number of hours required for full-time employment. (emphasis added)

The Commissioner would stress the word "hours" in the State Board decision above. That is to say, the duties performed or not performed are not the gauge in determining whether a teacher is full time. Rather, hours spent at school is the measure. The Commissioner concurs with the ALJ's analysis of the State Board decision in Middlesex County Educational Services Commission Education Association, supra, as well, however, and her conclusion as found in the initial decision, ante, wherein she states:

> In the present case none of the full-time employees "were employed" for as few hours as Rupakus. Applying the above determination of the State Board, I CONCLUDE that full-time teaching staff members are employed, that is, required to work, the number of hours required by the district for full-time employment. I further CONCLUDE that Charlotte Rupakus was not employed, that is, required to work, for the number of hours required for full-time employment and, therefore, may not be considered a full-time employee of the district.

The Commissioner further agrees with the ALJ that the Board is under no obligation to provide petitioner with extra hours of work and that "it is within its management discretion to utilize employees in the way it determines to be most efficient." (Initial Decision, ante) Therefore, it is under no obligation to provide extra duties or classes to petitioner. Moreover, the Commissioner's review of the record comports with the ALJ's that notwithstanding petitioner's willingness to spend time at school preparing for her teaching duties before and beyond her assigned work time, the fact remains that she is not required by the Board to be at school until 8:45 a.m. Full-time employees, on the other hand, are required to be present at 8:15 a.m., fully a half hour earlier. Similarly, the initial decision establishes that full-time employees are required

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to remain until 3:30 p.m. each day while petitioner's duties end at 2:50 p.m. Thus, petitioner's required hours differ from those of a full-time employee in respondent's district and she is therefore not entitled to full-time remuneration.

Because the standard set forth by the State Board in determining what constitutes full-time employment is predicated upon the number of hours required by the local board to qualify for a full step on the salary scale, the issues of the duties performed by petitioner need not be reached. Accordingly, the Commissioner will not address whether petitioner's duties are those of a SNAP teacher or otherwise. Hence, he need make no determination as to whether petitioner is bound by the settlement dated March 24, 1986 to which she was a party. Consequently, he does not adopt that part of the initial decision which concludes that petitioner is bound by the contract settlement of March 24, 1986. The Commissioner does note, however, that if petitioner's duties in working with classified students involve instruction as a primary teacher for such learning disabled pupils (see Initial Decision, ante, N.J.A.C. 6:28-4.1(g)) requires that she "hold the appropriate New Jersey certification or license commensurate with [her] assignment." The Board is hereby directed to insure that petitioner or any other similarly situated individuals who are solely charged with the primary instruction of learning disabled students hold proper certi- fication and endorsements.

Finally, the Commissioner concludes as did the ALJ below that there is no basis for awarding petitioner additional compensation for duties, but he so concludes because she presents no convincing basis for awarding such additional pay since it is clear from the record that she is not a full-time employee.

Accordingly, for the reasons set forth in the initial decision as modified herein, the Petition of Appeal of Charlotte Rupakus is dismissed, with prejudice.

Concerning the Petition of Appeal filed by Grace Collura, the Commissioner has reviewed the record and initial decision in the form of a joint stipulation of settlement rendered in this matter. The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

August 24, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3492-88
AGENCY DKT. NO. 117-5/88

COLLINGSWOOD BOROUGH
BOARD OF EDUCATION,
Petitioner,
v.
EDWARD J. CASHEL,
Respondent.

Ronald J. Ianoale, Esq., for petitioner (Parker, McCay & Criscuolo)

Edward J. Cashel, respondent, pro se

Record Closed: July 21, 1988 Decided: 7/29/88

BEFORE DANIEL B. MC KEOWN, ALJ:

The Collingswood Borough Board of Education (Board) seeks to have the Commissioner of Education suspend the teaching certificate under N.J.S.A. 18A:26-10 of Edward J. Cashel (respondent). The Board alleges respondent resigned his employment as a teacher in its employ without having afforded it, the Board, at least 60 days' written notice of his intention to resign in violation of N.J.S.A. 18A:28-8. The matter was transferred to the Office of Administrative Law on May 10, 1988 as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was scheduled for July 14, 1988. The prehearing conference was cancelled upon respondent's request after which the Board moved for summary decision in its favor by way of a letter

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Petitioner Grace A. Collura filed a petition of appeal with the Commissioner of Education on November 10, 1987, alleging that although she was required to teach a full-time instructional load and program, she was paid only 85 percent of a full-time teacher's salary and was denied the preparatory periods given to full-time teachers. Respondent filed an answer on November 30, 1987 and on December 2, 1987, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On August 31, 1987, Charlotte Rupakus filed a petition with the Commissioner of Education alleging that she was teaching a full-time instructional load and program while paid only 85 percent of a full-time teacher's pay and was denied the preparatory periods given to full-time teachers. Respondent filed an answer on September 22, 1987 and on September 24, 1987, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

After notice to all parties, a prehearing conference was held on November 30, 1987 at which time the two matters were consolidated and the hearing scheduled for February 23 and 24, 1988. Because of the unavailability of the administrative law judge (ALJ), the matter was rescheduled to March 17 and 18, 1988. The matter was adjourned at that time to allow the parties to negotiate a settlement. The hearing was rescheduled for June 1 and 3, 1988. The hearing was completed on June 1 and the record closed on that date.

On the day of hearing, the parties notified the ALJ of a settlement in regard to the matter pending between Grace A. Collura and the respondent. The terms of the settlement were placed on the record and a stipulation of withdrawal of petition was forwarded to the ALJ on June 27, 1988. That stipulation is attached to and made a part of this record.

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I have reviewed the record and the settlement terms and **FIND** that the parties have voluntarily agreed to the settlement as evidenced by their signatures and that the settlement fully disposes of all issues in controversy and is consistent with the law. I therefore **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded in regard to Grace A. Collura.

All issues relating to Grace A. Collura having been withdrawn, the hearing proceeded with regard to the appeal of Charlotte Rupakus. The issues to be resolved with respect to Rupakus are the following:

1. Is Charlotte Rupakus entitled to the salary and benefits of full-time teachers for the 1987-1988 school year?

2. Is she being unlawfully denied adequately paid preparatory time?

3. Are her claims barred by the doctrine of res judicata?

4. Are her claims barred by the application of the doctrine of collateral estoppel?

5. Are her claims barred by the entire controversy doctrine?

6. Are her claims barred by the terms of a settlement agreement which she entered into with respondent on March 24, 1986?

UNCONTESTED FACTS

The facts set forth in the following summary are not in dispute and I **FIND** them to be uncontested. On October 19, 1978, the Caldwell-West Caldwell Education Association filed a petition of appeal with the Commissioner of Education on behalf of

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individually named supplemental and Title I teachers employed by the Board, seeking an order declaring their services to be tenurable and also seeking additional salary and benefits. The matter was entitled Caldwell-West Caldwell Education Association et al. v. Bd. of Education of Caldwell-West Caldwell, Essex County, OAL DKT. NO. EDU 5147-83. State Bd. of Education, Aug. 6, 1986.

On March 24, 1986, a stipulation of settlement was signed between the Caldwell-West Caldwell Bd. of Education and several of the petitioners in the above matter including Grace Collura and Charlotte Rupakus. This stipulation resolved the claims of the individuals signing it, and their actions before the State Board of Education were withdrawn. That settlement reads in relevant part:

> NOW THEREFORE, in consideration of the mutual convenants hereinafter contained and the mutual obligations hereinafter entered into, by and between the parties, it is agreed as follows:
>
> 1. The Board will pay to Bohrer, Bruno, Collura, Rupakus and Scott the sum of $5,000.00 each in settlement of any and all back pay claims they may have had for their employment by the Board through June 30, 1986.
>
> 2. Effective September 1, 1986, the Board will place Bohrer, Bruno, Collura, Rupakus and Scott on the established salary guide (pro rata) for teaching staff members employed in the Board's school district.
>
> 3. Such salary guide placement shall be based upon the educational background of each individual named herein. Such salary guide placement shall include credit for educational background based upon the same standards, policies and contractual provisions applied to other teaching staff members employed by the Board.
>
> 4. For the 1986-87 school year, the salary guide placement of the individuals in question shall be as follows:
>
> Bohrer- Step 5
> Bruno- Step 5
> Collura- Step 5
> Rupakus- Step 5
> Scott- Step 5

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5. Since each individual teacher named in paragraph 4 is employed on a less than full time basis, her salary must be prorated according to her weekly work schedule compared to that of full time teaching staff members. These individuals have a work day equal to 85% of the work day of full time teachers. As a result, their salaries for the 1986-87 school year shall be determined by placement at the aforesaid step and level of the salary guide, and this salary shall, in turn, be multiplied by .85 to determine the actual salary of each individual.

Any teacher who works only nine (9) months of the school year shall have her prorated (Step/Level x .85) salary multiplied by .9 to determine actual salary.

6. Subsequent to the 1986-87 school year, each individual will advance on the salary guide in the same manner as classroom teachers employed by the Board. It is anticipated that they will advance one step for each school year in which they continue to be employed by the Board (e.g. Step 6 for the 1987-88 school year). In the event that they are still assigned to a work day shorter than full time classroom teachers, their salaries will continue to be prorated on the basis of their actual work day. (If their work day is increased, then the ratio will be adjusted upwards.) Similarly, salaries will be adjusted for any individual employed for less than a full school year, based upon the number of months actually worked.

Each individual will be eligible for advancement on the salary guide based upon changes in educational training levels based upon the same standards, policies and contractual provisions applied to other teaching staff members employed by the Board.

7. These individuals will be granted all other employment benefits, by statute, contract and practice, granted to other similarly situated part-time teaching staff members employed by the Board.

8. The Association and Board agree that SNAP teachers are within the bargaining unit represented by the Association and the Board voluntarily recognizes the representation of the Association regarding such position.

9. The terms of this agreement shall be incorporated as part of the terms of the collective bargaining agreement currently in effect between the Board and the Association.

10. All settlement sums due the individuals named herein will be paid within four weeks of the Board's resolution adopting this agreement.

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11. The individuals named herein hereby waive any claims for back salary and other emoluments they may have for employment occurring prior to September 1, 1986.

12. The Board will adopt a resolution approving the terms of this settlement at the first public meeting after the execution of this agreement.

13. The individuals named herein will execute and deliver releases to the Board.

Since the time of the settlement, Rupakus has been transferred to the Grover Cleveland Middle School. Her official hours are from 8:45 a.m. to 2:15 p.m. The actual hours she works are from 8:15 a.m. to 3:15 p.m.

From 8:45 until 9:30 a.m., she teaches a mathematics class, from 9:30 until 10:15 a.m. a second mathematics class and from 10:30 a.m. to 11:15 a.m., a third. These classes are on different levels (sixth and seventh grades), use different textbooks and require different preparation. Frequently, these students remain with her during her free time from 10:15 to 10:30 a.m. and from 11:15 to 11:30 a.m. for additional help.

Her preparation time is between 11:30 a.m. and 12:30 p.m. During this time, in addition to preparing for her classes, she writes all of the examinations she administers to the students, researches additional material, copies it in preparation for class use, and calls or meets with parents.

Between 1:15 p.m. and 2:00 p.m. and from 2:00 to 2:30 p.m., she teaches two reading classes on different levels. In the the second class, four of the students receive reading work and one remains for independent study until 2:50 p.m. All of her planning for the next day's work must be done after these students leave. She is also required to remain to tutor students or to keep them after school for disciplinary reasons. It often happens that students come in early in the morning or stay late in the afternoon to make up work so that they do not have to miss their regular class time.

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For the students assigned to her, she is a primary teacher. They have no other mathematics or reading teacher. Rupakus also must work with the child study team since many of her students are classified as learning disabled. Among her other duties are preparation and administration of tests and homework, preparation of report cards and contact with parents. When she is absent, a substitute teacher is provided.

Rupakus has never had an assignment as a homeroom teacher nor has she ever been given lunchroom or mandatory study class duty. There are full-time teachers who also have not had these assignments. She has indicated many times to the Board that she would be willing to undertake these responsibilities if that would make the difference in her classification.

Rupakus further states that there are full-time teachers whose classes contain fewer students than hers do. There are full-time teachers, Joan Ford for example, who do not have more "mods" of teaching time assigned per day than she does. (A "mod" is a 15-minute unit of time during the school day.) Twice she was asked to provide coverage for other teachers. Once she provided coverage three days when a teacher was absent; the second time she remained with seventh grade students not attending a field trip. This is a duty reserved for full-time teachers.

According to Rupakus, the settlement agreement of March 24, 1986 was signed while she was a compensatory education teacher or SNAP teacher. Since the agreement, she insists that her position has changed and that her present assignment is not within the job description of a SNAP teacher. The performance responsibilities of a SNAP teacher for the Caldwell-West Caldwell Public Schools are set forth in full below:

1. Works with members of the special services and pupil personnel teams to identify the educational needs and the physical and learning capabilities of those students assigned to him/her.

2. Devises, with the advice of the building principal, classroom teacher and/or child study team, an instructional program for each assigned student receiving supplementary or compensatory instruction.

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3. Meets with each assigned student on a regularly scheduled basis for the purpose of providing instruction.

4. Acquires personal acquaintanceship with the student's parents or guardians, and works to establish with them an understanding and cooperative relationship based on the student's individual needs.

5. Files written progress reports on each assigned student with the student's parents or guardians, and in the case of students temporarily assigned, with their regular teacher or teachers.

6. Keeps, maintains, and files such reports and records as the special services director may require, including attendance reports, case evaluations, and the like.

7. Assumes responsibility for obtaining textbooks and other teaching materials necessary through the procedures established.

8. Interprets the program for supplementary or compensatory education to the regular district staff and to the community at large as required.

9. Keeps informed of trends and new methods in education, remaining always alert to possibilities inherent in such information for adaptation to the particular needs of supplementary instruction.

10. Observes, consults with, and assists individual classroom teachers in their instructional program.

11. Works directly with individuals and small groups of students requiring special instructional help.

12. Assists in the selection of books and audiovisual aids.

13. Performs routine teacher duties at the discretion of the building principal.

TERMS OF EMPLOYMENT: Length of contract to be determined by identification of student needs.

Estelle Atkins testified that she was a teacher at the Middle School in the Caldwell-West Caldwell School District for 13 years until she retired after the 1986-87 school year. She was considered a full-time teacher and paid at 100 percent on the salary guide. Her required hours were from 8:15 a.m. to 3:30 p.m. daily.

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During her final teaching year, the 1986-1987 school year, Atkins taught compensatory seventh grade mathematics between 9:00 a.m. and 9:45 a.m. and compensatory sixth grade mathematics between 9:45 and 10:30 a.m. She conducted an English support group between 10:30 a.m. and 11:15 a.m. with one student overlapping from 10:45 a.m. until 11:30 a.m. From 11:30 until 1:00 p.m., Atkins had time for class preparation and lunch. From 1:00 p.m. until 2:00 p.m., she taught compensatory sixth grade reading with one student overlapping from 1:30 p.m. to 2:15 p.m. From 2:00 p.m. until 2:45 p.m., she taught compensatory sixth grade mathematics. Her schedule is 17 mods long. As part of her teaching duties, Atkins assigned homework to students and graded them for the course. When she was absent, a teacher covered her duties. She also covered for other teachers several times during the school year. She was not asked to do homeroom, lunchroom or mandatory study class duty during the 1986-87 school year.

Grace Collura testified that she had 15 mods of scheduled classroom time daily through the 1986-87 school year. She was also considered part-time, was required to be in the building from 8:30 a.m. to 2:15 p.m., and was paid at 85 percent on the salary guide.

Selected schedules of full-time teachers were submitted into evidence for comparison with the schedule of Rupakus. The schedules in evidence designate only special needs classes. Robert Hinkel, Director of Special Services for the Caldwell-West Caldwell Board of Education, described the 1986-1987 teaching schedule as follows:

Thomas Adams teaches children with special needs and is considered a full-time teacher. His schedule shows ten mods of classroom work, one mod of mandatory study class and a mod of cafeteria duty. He is also required to attend faculty and departmental meetings and has other assigned duties. His official day begins at 8:15 a.m. and ends at 3:30 p.m., as does the day of all full-time teachers. The schedule of a second teacher, Barusso, shows only two mods of class time. However, the rest of his day was spent teaching mainstream classes in biology. The schedule of the next teacher, Bohman, shows ten mods of classroom teaching, one mod of smoking area supervision, and one mod of cafeteria duty. Desilles' schedule shows only two mods of English As a Second Language,

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but the rest of his day was devoted to mainstream Spanish courses. Pace's schedule shows four mods of English and reading, but he also taught mainstream classes in basic English.

By contrast, Rupakus's schedule contains only ten mods of classroom instruction. She is not required to be in the building until the beginning of the third mod, that is, 8:45 a.m., and is finished with scheduled duties at 2:15 p.m.

Joseph Jacangelo, principal of the Middle School for 13 years, compared Rupakus's schedule with several other teachers:

Robert Adams is a full-time teacher who is paid at 100 percent on the salary guide. He reports to school at 8:15 a.m. and is scheduled to remain until 3:30 p.m. He teaches 16 mods of class time and has other duties not reflected on the teaching schedule; for the year in question Adams ran a school store using handicapped children at the school and had done this since the time he taught students classified as neurologically impaired.

A teacher named Lanni, who is considered full-time, has, in addition to his classroom mods, time reserved to conduct student testing on an as-needed basis.

Joan Ford was a full-time mathematics teacher at the high school before she retired at the end of the 1985-1986 school year. Before that year, her schedule consisted of five full classes daily. In 1985-1986, she taught only four classes or 12 mods; however, she also had two mods of lunchroom supervision during the day. In addition, some of her time was held in reserve by the Board to make her available to teach chronically ill children, if necessary. This, in fact, became necessary ten times during the school year for one-half hour at a time.

All SNAP teachers are paid at 85 percent on the salary guide. One teacher hired for compensatory education became full-time. She returned one year as a teacher of English As a Second Language, an area in which the Board determined that a full-time teacher was necessary, and was moved to 100 percent on the guide.

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All full-time teachers are required to be available for homeroom duty, for lunchroom or mandatory study class supervision as well as for attendance at departmental and faculty meetings. Rupakus has volunteered to undertake any of these duties, if assigned by the Board, and presently attends some faculty and departmental meetings on a voluntary basis. Full-time teachers must also provide coverage for other teachers, if needed; the request for Rupakus to provide coverage may have been under special circumstances or in error.

POSITION OF THE PARTIES

Rupakus argues that she is currently performing all of the duties of a full-time teacher and that the Board is artificially maintaining her at 85 percent on the salary guide by restricting her duties and working hours. It is unrealistic to expect her to complete her work within the time period for which they pay her: since she is now a classroom teacher, she must be there in the morning before the students get there in order to be ready, and the demands of her position require her to remain later than the time for which she is paid. Her paid hours do not include enough time for her to complete her preparation.

Finally, she urges that the settlement agreement of March 24, 1986 is no longer binding since she no longer occupies the same position she occupied at the time the agreement was signed. According to petitioner, she is no longer a SNAP teacher since she is required to perform duties not encompassed in the job description of a compensatory education teacher. This change in her schedule was as a result of the Board's action and, therefore, she can no longer be bound to the prior agreement with the Board.

The Board maintains that Rupakus is and always has been a SNAP teacher and, therefore, is still bound by the agreement she signed on March 24, 1986. As a result of that agreement, she is paid at 85 percent on the salary guide. Her work day is shorter than that of a full-time teacher and there is no requirement that the Board increase her hours of employment so that she can become a full-time teacher. She was hired in the capacity in which she presently serves and understood the part-time nature of the position at the time she accepted employment.

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DISCUSSION AND FINDINGS OF FACT

From the evidence it is clear and I **FIND** that petitioner is not employed as a full-time teacher. She is required to be at school from 8:45 a.m. until 2:50 p.m. A full-time teacher is required to be present from 8:15 a.m. until 3:30 p.m. Her schedule consists of ten mods of assigned teaching time; no full-time teacher described had less classroom time. Rupakus had no other assigned duties outside of her classroom schedule; full-time teachers were also required, among other things, to take a homeroom, supervise mandatory study periods, supervise lunchroom periods and attend faculty and departmental meetings at the school. Other faculty members were assigned by the Board to special jobs such as supervising a school store manned by disabled students or teaching chronically ill children as needed. Their actual hours employed at these assigned positions is irrelevant; it was required that a certain portion of their workday be dedicated to these functions and that they be available when necessary. The fact that Rupakus's job duties require an expenditure of time over and above her assigned schedule does not change the situation. All full-time teachers are required to expend time over and above their actual job assignments. Full-time teachers of special education are required to consult with child study teams concerning the students' programs and progress. All teachers are required to meet with parents, to remain after school if necessary for disciplinary purposes, to conduct parent conferences and to perform all the traditional auxiliary functions of teaching. These hours, although spent performing work contained within the job description, are not taken into consideration by the Board of Education in defining full-time status of a faculty member. If, as Rupakus argues, her nonclassroom hours must be counted toward full-time status, then she would still not be a full-time teacher since those designated as full-time faculty members are putting in still more time.

I **FIND** that the position held by Rupakus has not changed materially from that of a compensatory education teacher as it appears in the job description reproduced above. Rupakus is assigned to instruct classified or identified children in the district in a program of supplemental or compensatory instruction. She works with members of the child study team to develop an instructional program to meet the needs of each assigned student. She

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meets with each assigned student on a regularly scheduled basis to provide instuction; the fact that these meetings are conducted in a class rather than an individual setting does not remove them from the job description. She meets with the students' parents or guardians to discuss the students' progress and to develop a cooperative relationship to meet the students' needs. She prepares report cards on the assigned student; this does not seem qualitatively different from the written progress reports which the compensatory education teacher must file with the students' parents. A compensatory education teacher also has the responsibility to obtain textbooks and teaching materials. A compensatory education teacher may be assigned to perform routine teachers' duties at the discretion of the building principal. This discretion has apparently been exercised in the case of Rupakus since she does perform such duties.

Since the job duties of Rupakus have not substantially changed since the execution of the settlement agreement of March 24, 1986, and since that agreement covers the 1986-1987 school year and anticipates coverage for 1987-1988 and subsequent school years if she is still assigned to a shorter workday, and since I have previously determined that Rupakus is assigned to a workday shorter than a full-time classroom teacher, I **FIND** that the agreement of March 24, 1986 is still binding upon the parties.

As the agreement guarantees a salary prorated on the basis of the teachers' actual workday, including advances on the salary guide, in the same manner as classroom teachers employed by the Board, the Board can be said to have fulfilled its obligations under the settlement by paying of Rupakus at the agreed rate. The evidence indicates and I **FIND** that Rupakus worked 85 percent of the workday of full-time teachers. As a result, her salary was prorated according to the ratio of time spent. I therefore **FIND** her rate of compensation is correct under the agreement of March 24, 1986.

DISCUSSION OF LAW AND CONCLUSIONS

The law is clear that it is the function of the district board of education to determine the meaning of "full-time" employment.

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N.J.A.C. 6:20-5.6(b) provides as follows:

> (b) For the purposes of the Teacher Quality Employment Act, full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education prescribes for a teaching staff member to receive the full salary designated for their step on the district board of education's salary schedule.

Petitioner takes the position that the decision of the State Board of Education in Middlesex County Educational Services Commission Education Association v. Board of Directors of the Middlesex County Educational Services Commission, Middlesex County, dated January 7, 1987, stands for the proposition that a full-time teacher is one who expends the same number of hours as all other full-time teachers. This is not correct. In that case it is clearly stated that a full-time teacher is one who works the number of hours required by the Board for full-time employment. The State Board held on page 19:

> Accordingly, we conclude that the question of whether they were full-time teaching staff members during the relevant period requires a determination of whether they were employed for the number of hours required for full-time employment.

The Middlesex case differs from the present case in that none of the employees were working the hours alleged by the district to be full-time and, therefore, the State Board redefined the district's definition of "full-time" to comport with the actual fewer number of hours worked. In the present case none of the full-time employees "were employed" for as few hours as Rupakus. Applying the above determination of the State Board, I **CONCLUDE** that full-time teaching staff members are employed, that is, required to work, the number of hours required by the district for full-time employment. I further **CONCLUDE** that Charlotte Rupakus was not employed, that is, required to work, for the number of hours required for full-time employment and, therefore, may not be considered a full-time employee of the district. I have previously **CONCLUDED** that she is still bound by the settlement agreement of March 24, 1986, but even if that were not the case, she would not be entitled to payment for full-time status.

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Petitioner argues that she would become a full-time employee if the Board assigned her extra duties such as homeroom or lunchroom supervision which she would willingly take on. It is the Board's uncontroverted position that it is under no obligation to provide petitioner with extra hours of work, that it is within its management discretion to utilize employees in the way it determines to be most efficient. There is no reason to assign a part-time employee to duties within the job description of full-time employees when full-time employees are available and obligated to handle these duties.

Petitioner has not produced evidence to support her contention that other part-time employees similarly situated were given the full-time status which was refused to her. The employee singled out by petitioner as an example possessed a specific skill, teaching English As a Second Language, which, in the discretion of the Board, warranted promotion of the employee to full-time status. Nothing in the record indicates that petitioner's skills met a particular need of the district which warranted such an expansion of her duties.

As to petitioner's contention that she should be compensated for time spent in preparing for her teaching duties, this preparation time is already included as one of the performance responsibilities of compensatory education teachers. Rupakus already has the obligation to devise an instructional program for each assigned student, write progress reports, keep, maintain and file reports and records as required, obtain textbooks and other teaching materials necessary and keep informed of trends and new methods in education. I **CONCLUDE** that there is no basis for awarding additional compensation for duties included in the job description and for which Rupakus is already receiving compensation.

ORDER

Based upon the above, it is **ORDERED** that the petition of Charlotte Rupakus for compensation as a full-time teaching staff member and/or for additional compensation for required preparatory time should be and hereby is **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

July 18, 1988
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

July 19, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 21 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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CHARLOTTE RUPAKUS,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	COMMISSIONER OF EDUCATION
GRACE A. COLLURA,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision filed by the Office of Administrative Law have been reviewed. Petitioner Rupakus' exceptions were untimely filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Thus, the Board's reply exceptions thereto were not considered in the Commissioner's determination.

The issue before the Commissioner in this matter requires investigation into what constitutes full-time service for a teaching staff member in respondent's district pursuant to N.J.S.A. 18A:29-5, in an effort to resolve the issue of whether Petitioner Rupakus is entitled to be paid at 100 percent of the salary guide. Based upon the record before him, the Commissioner concurs with the ALJ below that she is not a full-time employee for the reasons that follow.

N.J.S.A. 18A:29-5 defines "full time" as meaning "the number of days of employment in each week and the period of time in each day required by regulations of the State board to qualify a person as a full-time teaching staff member." See also N.J.A.C. 6:20-5.6(b) which states:

> (b) For the purposes of the Teacher Quality Employment Act, full-time employment shall mean the number of hours in a day and the number of days in a week the district board of education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3492-88
AGENCY DKT. NO. 117-5/88

COLLINGSWOOD BOROUGH
BOARD OF EDUCATION,
Petitioner,
v.
EDWARD J. CASHEL,
Respondent.

Ronald J. Ianoale, Esq., for petitioner (Parker, McCay & Criscuolo)

Edward J. Cashel, respondent, pro se

Record Closed: July 21, 1988 Decided: 7/29/88

BEFORE DANIEL B. MC KEOWN, ALJ:

The Collingswood Borough Board of Education (Board) seeks to have the Commissioner of Education suspend the teaching certificate under N.J.S.A. 18A:26-10 of Edward J. Cashel (respondent). The Board alleges respondent resigned his employment as a teacher in its employ without having afforded it, the Board, at least 60 days' written notice of his intention to resign in violation of N.J.S.A. 18A:28-8. The matter was transferred to the Office of Administrative Law on May 10, 1988 as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was scheduled for July 14, 1988. The prehearing conference was cancelled upon respondent's request after which the Board moved for summary decision in its favor by way of a letter

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memorandum filed here July 20, 1988. While respondent did not file a response to the Board's letter memorandum, respondent does take the position that he shall rely on the "explanations" he has already given regarding his conduct. This decision finds that respondent did engage in unprofessional conduct by failing to afford the Board 60 days written notice of his intention to resign.

BACKGROUND FACTS

Background facts of the matter as established in this record by the affidavits in support of an order to show cause, exhibits, and writings received from respondent are as follows. The Board's superintendent of schools attests in an affidavit filed that respondent was employed by the Board on or about December 21, 1987, effective January 4, 1988, as a long-term substitute teacher for the remainder of the 1987-88 year. The written employment contract entered by the Board and respondent required that either party to the contract give the other party 60 days' notice in writing of any intention to resign.

Respondent possesses an instructional certificate with endorsements to teach typewriting, bookkeeping and accounting, general business studies, and data processing. His social security number is set forth in the superintendent's affidavit. Respondent began his employment as a data processing teacher at the Board's junior high school on or about January 4, 1988. Less than one month later, on February 3, 1988, the junior high school principal received a written letter of resignation from respondent. The letter, dated February 2, 1988, is reproduced here in full:

> Due to the fact that my father recently entered a nursing home my mother is now living alone and needs assistance. She is scheduled for foot surgery in the Spring. I must move back to the Trenton area to care for them. I will seek employment there.
>
> I regret I must resign from your school so suddenly, but my parent's welfare is a primary concern. I would not be able to do a proper job at Collingswood if I were to stay.

Neither the principal, the superintendent, nor the Board received any prior notification from respondent of his intention to resign. Respondent did not return to his employment with the Board subsequent to February 2, 1988.

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The principal wrote respondent on February 3, 1988 expressing shock and dismay at respondent's sudden resignation. Respondent was requested to continue in his employment until a replacement could be found. Respondent did not honor this request. Later, on February 11, 1988 the principal complained to the superintendent of items missing from respondent's classroom including a curriculum guide, folders, and dated discs. These items were subsequently located.

There is some evidence in the record which shows that respondent had been earlier employed by the Eastern Camden County Regional School District Board of Education. Respondent, it is reported, resigned without notice from that employment on November 17, 1987.

On or about March 30, 1988 the Board, through counsel, applied before the Commissioner of Education for an Order to Show Cause, with affidavit, regarding the conduct of respondent. The Board sought to have the Commissioner suspend the teaching certificates of respondent for unprofessional conduct under N.J.S.A. 18A:26-10 for his termination of employment without affording the Board 60 days' prior written notice. Respondent served an answer to the Order to Show Cause on April 20, 1988 with Board counsel; not before the Commissioner. Nevertheless, respondent claims in the letter response he did not create a serious disruption at the junior high school when he terminated his employment; that he terminated his employment with the Eastern Camden County Regional Board of Education earlier because his life was threatened by a pupil who was in his classroom. Respondent explained that he left the employ of the Collingswood Board of Education because of unexpected problems. Respondent explained that he was a substitute teacher in the employ of the Collingswood Board and that the Board has many substitute teachers on call. Finally, respondent explained he left his employment with the Board at the end of a cycle and, consequently, another substitute teacher could easily come in and begin a new cycle for the Board.

There is some evidence in this record by way of a letter from the superintendent of the Eastern Camden County Regional School District that respondent's explanation of his departure is less than accurate. The superintendent explains in his letter of May 31, 1988 that respondent's life being threatened by a pupil involved two friends who were playing with a father's gun. Neither child was seriously injured nor were police charges filed. The superintendent asserts that the presence of these students never constituted a real threat to respondent or to anyone else.

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When the matter was transferred to the Office of Administrative Law as a contested case on May 10, 1988 respondent advised the Chief Judge of Administrative Law, in writing on June 27, 1988, as follows:

> I am presently in a different line of work. I am not in need of data processing teaching certification. My present work schedule will not afford time for a telephone conference or the planned hearing.
>
> I think the explanations that were already given by me in writing are adequate. If it is decided that my responses are not adequate, then there is no other alternative but to proceed with the suspension of my teaching certificates.

This concludes a recitation of the background facts of the matter. From these background facts, the following relevant facts are found to be established by a preponderance of credible evidence:

1. Respondent entered into a written contract of employment with the Collingswood Board of Education on December 21, 1987 to each in the Collingswood schools as a long-term substitute teacher between January 4 through June 30, 1988.

2. The written contract of employment provides that the parties to the agreement, the Board and respondent, give the other party 60 days' notice in writing of an intention to terminate the employment contract.

3. Respondent resigned his employment as a long-term substitute teacher by letter dated February 2, 1988. No prior notice of respondent's intention to resign was given school authorities.

4. Respondent did not provide school authorities with 60 days' notice of written intention to resign his employment as required by the employment contract.

This concludes a recitation of relevant, material facts of the matter.

DISCUSSION AND CONCLUSION

N.J.S.A. 18A:26-10 provides in full as follows:

> Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

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The facts in this case disclose respondent entered a written contract of employment with the Board in order to be a teacher for it between January through June 1988. He further agreed to provide the Board 60 days' notice of written intention to relinquish such employment. Respondent failed to provide the Board with such 60 days' written notice of intention to resign and the Board did not approve of his release on shorter notice. Therefore, given the facts of this case I **CONCLUDE** respondent is guilty of unprofessional conduct. There are no mitigating factors presented by respondent why, given his unprofessional conduct, the Commissioner should not suspend his certificates for a period not exceeding one year. The statute applies to respondent. Therefore, the certificates of Edward J. Cashel shall be and are suspended for a period of one year which shall commence upon the date this decision becomes a final decision.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

July 29, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

5-1-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 3 1988
DATE

Ronald W. Parker K.S.
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
EDWARD J. CASHEL, SCHOOL DISTRICT	:	DECISION
OF THE BOROUGH OF COLLINGSWOOD,	:	
CAMDEN COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner finds no evidence therein which would persuade him that a reversal of the findings and conclusion set forth in the initial decision is warranted. The Commissioner hereby adopts as his own said findings and conclusion of the ALJ in this matter and hereby directs that the teaching certificates of Edward J. Cashel shall be and are suspended for a period of one year pursuant to the provisions of N.J.S.A. 18A:26-10. The one year period of suspension of respondent's teaching certificates shall commence as of the date of the Commissioner's decision in the instant matter.

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A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of taking any further action which it deems appropriate pursuant to law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 1, 1988

DATE OF MAILING - SEPTEMBER 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7673-87
AGENCY DKT. NO. 318-10/87

BERNARD LAUFGAS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY AND FRANK L. NAPPO, BOARD MEMBER,
Respondents.

Bernard Laufgas, petitioner, pro se
Kathleen Hofstetter, Esq., for respondents (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: May 31, 1988 Decided: July 13, 1988

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE

In a poorly crafted Petition of Appeal, petitioner challenges the expenditure of public funds by the Board of Education of the Township of Barnegat (Board) alleging a violation of N.J.S.A. 18A:4-14 whereby the Board authorized per diem expenses to certain Board members and its Superintendent of Schools to attend approved and authorized educational conventions. Petitioner also alleges that Board member Frank L. Nappo is not a citizen of the United States of America and,

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therefore, not qualified to hold a seat on the Board, in violation of N.J.S.A. 18A:12-1 et seq.

PROCEDURAL ASPECTS

Petitioner filed his Petition of Appeal with the Commissioner of Education on October 26, 1987. Thereafter, on November 13, 1987, the Board filed its Answer to the Petition together with seven separate defenses before the Commissioner. On November 23, 1987, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Pursuant to N.J.A.C. 1:1-13.1 et seq. a prehearing conference was conducted on January 26, 1988, at which, among other things, the issues to be determined by this tribunal were agreed upon by the parties and the schedule for hearing was set forth.

Subsequent to the prehearing conference, petitioner sought to amend his petition of appeal by way of Notice of Motion dated March 18, 1988. The Board objected by way of letter memorandum and affidavit dated March 21, 1988, setting forth facts in support of its opposition to petitioner's motion to amend. Petitioner did not respond to the Board's memorandum in opposition to his motion to amend. A careful review of the law persuaded this tribunal to deny petitioner's motion to amend the petition of appeal by way of Decision on Motion and Order dated April 13, 1988. Petitioner did not appeal this order.

On March 21, 1988, Kathleen W. Hofstetter, Esq., counsel for the Board, addressed a letter to Thomas F. Lowe, Clerk of the OAL, with a courtesy copy to the undersigned, wherein Ms. Hofstetter asserted, among other things, that petitioner Laufgas had appeared at her office to personally serve her with the moving papers concerned with his motion to amend the pleadings. Ms. Hofstetter asserted and alleged, in part, that on that occasion petitioner Laufgas made several inappropriate, scandalous, derogatory and despicable comments concerning her in her office reception area in the presence of clients, office staff, and other attorneys (See Attachment A).

As a consequence of Board counsel's March 21, 1988 letter, the undersigned issued a letter to petitioner dated March 28, 1988, wherein petitioner was advised,

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among other things, that his statements were inappropriate and not to be condoned. Petitioner was further advised that he was subject to the control of this court by virtue of R. 1:21-1(b) and that he would be held to the standards under the Rules of Professional Conduct pursuant to RPC 1.1 et seq.; a breach of which could lead to sanctions pursuant to N.J.A.C. 1:1-14.6(j) (See Attachment B).

Thereafter, on May 4, 1988, petitioner filed a Notice of Motion and Certification to disqualify the undersigned from hearing and deciding the Petition of Appeal. An expedited oral argument was conducted via telephone on May 5, 1988 on petitioner's motion. By way of Decision on Motion dated May 6, 1988, petitioner's motion to disqualify the undersigned was dismissed with prejudice. In addition, this tribunal found petitioner's Certification to be in violation of R. 1:4-8 where it contained scandalous matter and, therefore, ordered sanctions to be imposed, pursuant to N.J.A.C. 1:1-14.4(c)4. The sanctions against petitioner was limited to his payment to the Board's counsel all fees and costs for counsel's time related to his motion to disqualify the undersigned (See Attachment C). Petitioner did not appeal the dismissal of his motion to disqualify nor this court's order of sanctions. This matter is discussed in more detail post.

MOTION

The Board now, by way of Notice of Motion, Affidavit, Brief and Certifications, requests that the Petition of Appeal be dismissed for failure to state a cause of action upon which the Commission may grant petitioner's requested relief. Petitioner, by way of Certification and Brief, opposes the Board's motion.

Oral argument on the Board's motion was conducted on May 10, 1988, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The herein record was kept open until May 31, 1988 for receipt of petitioner's supplemental submission. Petitioner failed to submit, therefore, the record was closed on May 31, 1988.

RESPONDENT BOARD'S POSITION

STATEMENT OF FACTS

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Pursuant to the Certifications submitted herewith, at a regularly scheduled Board of Education meeting on September 28, 1987, the Board of Education by Motion approved a per diem amount of $100.00 for members attending the New Jersey School Board Association Convention on October 28, 29 and 30 with receipts at the discretion of the individual. Four (4) members of the Board of Education attended the Convention: Anthony Altomare, Gary Bahr, Vincent Palmieri, and Christopher Haines. Additionally, the Superintendent, Dr. Robert Horbelt attended same. The Board Secretary paid the requisite registration fee for the attendance at the Convention for these individuals. Additionally, the Board Secretary paid for the hotel accommodations for these individuals. Furthermore, each of these individuals were given a $100.00 per diem amount for their attendance at the Convention to cover all other expenses.

Three of the four Board members who attended submitted receipts. Those same Board members also submitted reimbursement checks to the Board of Education. The Certifications reflect that Vincent Palmieri submitted receipts and a reimbursement check in the amount of $44.73. Board member, Anthony Altomare submitted receipts and a reimbursement check in the amount of $49.71. Furthermore, member Gary Bahr submitted receipts and a reimbursement check in the amount of $66.82.

According to the Certifications submitted herewith, on October 13, 1987, the Board of Education approved the Superintendent of Schools' attendance at the American Association of School Administrators Convention in Las Vegas, Nevada in February of 1988, with an approval for payment of registration, air fare, hotel and a per diem of $125.00. Pursuant thereto, the Board Secretary paid said expenses and a per diem amount for the Superintendent's attendance from February 18 through the 23, 1988.

Dr. Horbelt submitted receipts to the Board of Education for his attendance at the Convention. He also reimbursed the Board the amount of $572.50.

Based upon the aforestated, it is apparent that even though receipts were not mandated, three of the four members who attended the New Jersey School Board Convention submitted receipts and the Superintendent who attended the American Association of School Administrators Convention submitted receipts.

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A review of the Certification of Frank L. Nappo, indicates that Mr. Nappo is a United States Citizen having been born in Englewood, New Jersey on May 13, 1943. Although this document was provided to the Petitioner as an attachment to Answers to Interrogatories, and with a request for the Petitioner to dismiss this part of the Petition, the Petitioner refused to withdraw the allegation concerning Mr. Nappo. Additionally, according to Mr. Nappo's Certification, he is no longer a member of the Board of Education.

It was the Board members' understanding that the per diem expenses were permitted by law as well as the provision in Policy No. 0402, which stated that "Special conditions require Board approval". Pursuant to this clause, the Board would approve a per diem amount prior to a Convention. Furthermore, the Certifications reflect that a revised Policy No. 0402 was adopted by the Board of Education on March 14, 1988 concerning reimbursement of expenses.

STATEMENT OF LAW

Respondents have filed this Motion to dismiss the Petition filed in this matter for petitioner has failed to state any cause of action upon which his requested relief may be granted. A review of the governing principles of law and the application of the law to the facts in the case sub judice clearly dictates that Respondents' motion should be granted for petitioner has wholly failed to set forth any cause of action upon which the relief which petitioner is requesting may be granted by this Court.

POINT I
COUNT II OF THE PETITION FAILS TO STATE A CAUSE OF ACTION FOR FRANK L. NAPPO IS A UNITED STATES CITIZEN

In Count II petitioner questions the qualification of Frank L. Nappo to serve as a member of the respondent Board of Education. More particularly, he asserts that Mr. Nappo stated that he was a "Sicilian National" when an inquiry was made concerning his United States citizenship. Therefore, petitioner seeks an Order to remove Mr. Nappo from the Board of Education as unfit and for an Order requiring that Mr. Nappo declare himself an "American citizen" and an "American national".

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The relevant statutory law clearly mandates that a member of the board of education must be a United States citizen. N.J.S.A. 18A:12-1. Respondents fully acknowledge and recognize this legal principle. However, a review of the Certification submitted by Frank L. Nappo in support of this Motion clearly indicates that he is a United States citizen. Mr. Nappo was born on May 13, 1943 in Englewood, New Jersey. In support of his statement that he is a United States citizen, Mr. Nappo has submitted his Certificate and Record of Birth from the Cliffside Park Board of Health, his Birth Certificate from the New Jersey Department of Health Bureau of Vital Statistics and his Certificate of Baptism. All of these documents unquestionably indicate that he is a United States citizen. Therefore, he would not be disqualified from membership on the Barnegat Township Board of Education as a result of his citizenship inasmuch as he fulfilled the statutory mandate quite to the contrary of petitioner's allegation.

Parenthetically, it should be noted that, as per Mr. Nappo's Certification, he is no longer a member of the Barnegat Township Board of Education. Therefore, the issue as far as his citizenship is moot and need not be adjudicated by this Court.

Based upon the aforestated, the facts clearly indicate that Mr. Nappo is a United States citizen and therefore he should not be determined disqualified from membership on the Barnegat Township Board of Education because of his citizenship. Accordingly, it is appropriate that Count II of the Petition be dismissed for petitioner has failed to state a cause of action upon which the relief he requests could be granted.

POINT II

COUNT I OF THE PETITION FAILS TO STATE A CAUSE OF ACTION FOR THE RELIEF REQUESTED FOR RESPONDENTS DID NOT ACT IN CONTRAVENTION OF N.J.S.A. 18A:4-14

Petitioner asserts that the Board committed a violation of N.J.S.A. 18A:4-14 when it undertook formal action to authorize per diem expenses rather than requiring receipts for expenses incurred for five (5) Board of Education members to attend the annual New Jersey School Boards Convention in Atlantic City.

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Additionally, petitioner asserts that the Board committed a violation of the same statutory provision when it authorized a flat per diem allowance for its Superintendent of Schools to attend the annual meeting of the American Association of School Administrators in Las Vegas, Nevada in February of 1988.

Pursuant to the terms of the Pre-Trial Order, the issues to be resolved as a consequence of the pleading are twofold. One, whether the Board did violate N.J.S.A. 18A:4-14 when it acted in the manner alleged by the petitioner. And, if so, what relief may be afforded petitioner.

A review of the petition indicates that the requested relief is as follows:

1. For an order to compel any member of the Barnegat Township Board of Education that may attend any convention to submit receipts for any and all monies received.

2. For an order to compel Robert Horbelt to submit receipts for any monies he received for the trip to Las Vegas, Nevada.

3. For an Order prohibiting per diem payment to anyone for any trip to any convention.

The singular complaint raised in the Petition of Appeal is that the Board acted in contravention of N.J.S.A. 18A:4-14, when it permitted a per diem allowance for Board members and the Superintendent's attendance at certain conventions rather than mandating the submission of receipts for expenses incurred at said conventions. The petitioner does not allege that the Board abused its discretionary authority or exercised its discretion in an arbitrary, capricious or unreasonable manner. He simply alleges that the Board acted in contravention of the one specific statutory provision.

The statutory provision cited by the petitioner states as follows:

> The state board shall prescribe a uniform and simple system of bookkeeping for use in all school districts and compel the maintenance and use of the same. N.J.S.A. 18A:4-14.

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The location of this statutory provision within Title 18A is relevant. The statutory provision falls within Chapter 4, Article 2, of 18A which governs the State Board of Education. Accordingly, the purpose of this statute was to require that the State Board undertake a particular action. That is, the Legislature mandated that the State Board prescribe a system of bookkeeping and compel the maintenance and use of that system of bookkeeping. It does not directly establish an affirmative duty on a school system. Rather, it sets forth one of the obligations of the State Board. Therefore, logically, it is impossible for a board of education to act in contravention of a statutory provision which does not pertain to it but which establishes an obligation for the State Board of Education and not an obligation or duty for the board of education. Therefore, at the outset, it is essential to realize that the respondent could not act in contravention of this statutory provision for it does not mandate that any affirmative action be taken by a board of education.

Furthermore, nothing in this statutory provision specifically requires that a board of education mandate the submission of receipts for expenses rather than permitting a per diem allowance for attendance at conventions. This is apparent from a plain reading of the statutory provision.

The State Board rules concerning bookkeeping and accounting in local school districts, as required by N.J.S.A. 18A:4-14, are set forth in N.J.A.C. 6:20-2.1 et seq. There is no requirement contained within those provisions that mandates the submission of receipts for expenses in lieu of authorization for per diem allowances. Therefore, a per diem allowance for conventions is not prohibited by these bookkeeping and accounting regulations.

Furthermore, it should be noted that the petitioner has not alleged any violations of Chapter 19 of Title 18A, which specifically governs the expenditures of funds. Indeed, the record fails to reflect any violations of the statutory requirements contained within that Chapter. The Certifications submitted in support of this Motion clearly indicate that there were properly prepared and submitted vouchers for all expenditures associated with the conventions.

Based upon the aforestated, it is indisputable that the actions taken by the respondent, Barnegat Township Board of Education, in no way violated N.J.S.A.

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18A:4-14. Therefore, petitioner has failed to state a cause of action upon which the requested relief may be granted.

The actions taken by the Board of Education constituted a discretionary action. Pursuant to N.J.S.A. 18A:11-1(d), the Board of Education is given legislative authorization to undertake certain discretionary acts. More particularly, that statute provides as follows: "The Board shall perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

Pursuant to this statutory provision, the Board's action is proper and appropriate. It has been recognized by the Commissioner of Education that permitting the attendance of board of education members and employees at these type of conventions is a valid action by the Board of Education. *Sturman v. Union County School Boards Association*, Commissioner of Education Decision #254-82, 9/20/82.

It was in the Board's discretionary power to authorize per diem payments. Furthermore, this was in accordance with the Board policy in effect at the time, which specifically permitted the Board to take action prior to each convention to authorize a set figure for a per diem amount. The certifications submitted herewith indicate that each of the Board members specifically understood the policy to be interpreted in this manner and believed that, at all times, they acted in accordance with the governing law and the policy.

It is essential to realize that the petitioner has made no allegation challenging the Board's exercise of its discretion in this matter. Petitioner merely asserts that the action by respondent was in contravention of a particular statutory provision. Based upon the aforestated, it is apparent that the action did not violate the statutory provision referred to by the petitioner.

Even if the petitioner were to prevail on the merits of his allegations, the requested relief has already been complied with or exceeds the power of this Court inasmuch as it involves discretionary action of the Board.

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Petitioner has requested an Order compelling Dr. Horbelt to submit receipts for any monies he received for the Las Vegas, Nevada convention.. The documentation submitted herewith indicates that Dr. Horbelt submitted receipts as well as reimbursed monies to the Board of Education.

Furthermore, the petitioner requests an Order prohibiting per diem payment by the Board to anyone for any trip to any convention and mandating that any board member that attends any convention submit receipts for any and all monies received. This once again is a matter within the discretionary authority of the Board of Education. Unless there has been an adjudication that there has been an abuse of discretionary authority, the Board should be permitted to govern itself in this matter pursuant to statutory authorization. The documentation submitted herewith demonstrates that three of the four Board members that attended the New Jersey School Boards Association Convention did submit receipts and that they reimbursed a small amount of money to the Board. This demonstrates that the per diem amount established by the Board at its meeting reasonably approximated the actual expenses of the attendees at the convention.

Additionally, as the Certifications submitted herewith reflect, the Board has undertaken action to adopt a revised policy concerning reimbursement of expenses. This was done as a result of a comprehensive redrafting of the policies of the School District, wherein the Board is evaluating, revising and updating its board policies.

Based upon the aforestated, it is apparent that the petitioner has failed to state a cause of action in Count I upon which the requested relief may be granted. Accordingly, it is proper to grant respondent's Motion to Dismiss the Petition.

PETITIONER'S POSITION [1]

STATEMENT OF LAW

No may commit an act of thief from the children of
Barnegat without repayment of those monies.
Nor may an attorney coverup for such acts.

---

1 Petitioner's brief is set forth herein exactly as submitted and without any correction or editing.

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POINT I

SINCE NAPPO PAST AWAY FROM
THE SEEN OF THE BARNEGAT
SCHOOL BOARD SEEN THE MATTER
IS MOOT.

It is shamefull for any American to call himself
"Sicilian national" or any other, but an American.
Since Nappo did just that he is guilty as sin,
However, since he is no longer with us, there is
no need to persue this matter any longer.
Thank god he is gone from the school board.

POINT II

N.J.S.A. 18A:4-14 COMPELS RESPONDENTS
TO CONFORM WITH THE UNIFORM AND SIMPLE
SYSTEM OF BOOKKEEPING THRU RESPONDENTS
POLICY #0402 THEREFORE PETITIONER HAS
STATED A CAUSE OF ACTION

N.J.S.A. 18A:4_14 specifically compels Respondents
to comply with the statute

"The State Board of Education SHALL prescribe
a UNIFORM and SIMPLE SYSTEM OF BOOKKEEPING
for use in all schools districts, and COMPEL all
school districts to use the same."

The prescribed bookkeeping system is provided in
the sound plan Policy #0402, EXHIBIT "A" for the
general account to the safeguard of expenditures
of tax dollars. Those safeguard are for the
adequate financial information for the general
public as well as the Commissioner of Education
and school administato
even through he has thru the years committed
theif of thousands of tax dollars.

There is no dispute that Respondents may attend
any conventions STURMAN-V-UNION COUNTY
SCHOOL BOARD ASSOC. Commissioner decision
254-82 9/20/82. However, Respondents must
comply with their bylaws Policy #0402, SO stated the
Appellate Court on March 14, 1988 in MATAWAN
REG. THEACHERS ASSOC-V-MATAWAN ABERDEN
REG. SCHOOL DISTRICT BOARD OF EDUCATION
Docket NO: A-1654-86T8 and A-1660-86T8 also see
HICKS-V- LONG BRANCH COMMISSION 69 N.J.L. 300
55A. 250 (E & A 1903) holding that any public body

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is bound by its own by laws thus it policy.

Respondents aduption of policy #0402 to read as follows:

C. Regulations

The requirement for Board payment to individuals....
for dinner. tools etc. will be STRICTLY ENFORCED AND
NO PAYMENT WILL BE MADE UNTIL THE FOLLOWING
IS PRESENTED AT A REGULAR MEETING.

1. Riepts

2. Rimborsment WILL NOT EXCEED policy stipulation.
3. ...the policy is strictly followed and that NO vouchers SHALL
be presented to the Board for an amount in excess of policy
stipulation.

D. EXPENDITURES REIMBURSMENT

1(a) Twenty cent per mile.
2. Meals
Lunch 4.50
Dinner 9.00

While Respondents are on the band-wagen that
their conduct in expenses are discretionary and
per diem for state or national conventions, policy 0402
speaks to a different tune. Once respondents
aption of that policy they have to live with it.,
so sated the commissioner in SHIFRINSON -V- MARLBORO
BOARD OF EDUCATIOM "Once adupted it becomes
part of the rules" S.L.D. June 4, 1984 BERGEN
COUNTY VO-TEACH BOARD OF EDUCATION
SCHOOL-V-BERGEN COUNTY VO-TECH ASSOC---
N.J. Super Decided Feb. 5, 1987 pending
Approval for publication (Appellate

The Court in CITRO-V-REILLY 99 N. J. Super 215 1968
made it clear at 218 "It is significent that same of
the vouchers were presented and paid in the
beginning...for which the expenses were alleged
incurred, an obvios impossibility because
(Respondents) can not determine his expenses
until (it) was over that same Court further stated
"The Court finds factually that not one of the
Vou chers complied...They are clearly violative
therefore and were unlawfull". The Court in
O'DONNELL-V-BOARD OF CHOSEN FREEHOLDERS,
COUNTY OF MORRIS 31 N.J. 434 1960 held that
"Resolution are involid and should be set aside"
to correct irregularities to insure adequate
public records of expenditures, hence payments
are unlawfull.

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> It is essential to realize that respondents want to excerise of some "OF THE WALL" discretionary and per diem power are not part of the language citied in policy #0402 thus failes the test of that policy. Moreover, the paymen for their spouces are clearly outside that same policy and can't be even used, however they did pay for their spouces meals and others.
>
> For the foregoing reasons Petitioner respectfully submit that Petition has stated a cause of action and Respondants motion be therefore denied.

DISCUSSION AND CONCLUSIONS

After a careful review of the arguments of the parties and having fairly weighed their respective positions with regard to the law, I **FIND** and **CONCLUDE** that the Board's Motion to Dismiss the Petition of Appeal must be **GRANTED** and the herein action is **DISMISSED** for the reasons that follow.

PETITIONER'S COUNT II

In his Petition of Appeal at Count II, petitioner alleges and verifies that:

> On or about September 14, 1987, Board member Frank L. Nappo, stated to petitioner and the Board of Education that he is a "Sicilian National".. when asked about his United States citizenship he once again stated "I am a Sicilian, that correct."..

It is on the basis of this alleged statement by Mr. Nappo, and without more, that petitioner brings the herein action for the removal of Nappo as an unqualified member of the Board pursuant to N.J.S.A. 18A:12-1 or, in the alternative, that the Commissioner issue an order that Nappo "...declair himself an American Citizen and An American nationa." (Petition of Appeal, Count II, para. B.). Petitioner does not advise us as to the conditions or circumstances under which the alleged Nappo statement was made. The statement could have been made in a candid, straight-forward manner. Or, it could have been made in jest as a facetious response to a

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"stupid" question. Or it might have been made in frustration. Or, perhaps, as a statement of ethnic pride. Petitioner does not alert us as to the origins of the statement other than Nappo is alleged to have made it to petitioner.

Petitioner does not trouble himself to seek the truth or falsity of the statement but, rather, immediately arrives at the conclusion that Nappo is disqualified for membership on the Board for the reason that Nappo is not a citizen of the United States of America. Even after Mr. Nappo and the Board produce unrefuted documentary evidence to the contrary, petitioner is unwilling to accept the truth of the matter and concede that Nappo is, in fact, a citizen of the United States of America. Rather, petitioner wishes this tribunal to accept the truth of his assertion and declare the matter moot because Mr. Nappo no longer holds a seat on the Board.

While it is true, in fact, that Frank L. Nappo no longer holds a seat on the Barnegat Township Board of Education, I nevertheless, **FIND** and **CONCLUDE** that petitioner's assertions of Nappo's lack of citizenship and, thus, disqualified to hold a seat on the Board were nothing more than conclusory statements of petitioner. I **FIND** and **CONCLUDE** that petitioner set forth no facts in support of his conclusions that Nappo was or is disqualified to hold an elected position with the Board. I **CONCLUDE** that petitioner's bare assertion that Nappo is disqualified, without more in support of that assertion, is insufficient to rise to a justiciable controversy. *Suggs v. Bd. of Ed. of the Borough of Asbury Park* 1988 S.L.D. _____ (Commissioner's decision February 23, 1988).

Accordingly, it is **ORDERED** that Count II of the herein Petition of Appeal be and is hereby **DISMISSED WITH PREJUDICE**.

PETITIONER'S COUNT I

Petitioner insists, by way of his Petition of Appeal and in his Brief in Opposition to Notice of Motion to Dismiss, that the Board was in violation of N.J.S.A. 18A:4-14. Petitioner alleges in his petition that the Board's action to authorize certain Board members and employees to attend professional and educational conventions on a flat, per diem allowance violated the statute.

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Aside from the fact that petitioner's brief is difficult to read and comprehend due to misspellings, his unorthodox syntax, and his conclusory statements without a basis in fact; an examination of N.J.S.A. 18A:4-14 clearly shows that the Legislature intended for the State Board of Education to establish and "...prescribe a uniform and simple system of bookkeeping for use in all school districts and compel the maintenance and use of the same." Pursuant to its rule-making authority under N.J.S.A. 18A:4-15, the State Board complied with the Legislature's mandate and promulgated N.J.A.C. 6:20-2.1 et seq. entitled, "Bookkeeping and Accounting in Local School Districts." A careful reading of the 14 subsections under this Administrative Code demonstrates that the intent of the Legislature is fulfilled by the declared purpose of the regulations, which is stated as follows:

> N.J.A.C. 6:20-2.1 Prescribed system of bookkeeping
>
> (a) It shall be the purpose of the bookkeeping and accounting system prescribed herein to provide a sound plan of general accounts that will serve to safeguard the expenditure of public funds; effect proper budgetary control; establish uniformity in the classification of expenditures; and furnish adequate financial information for use of the public, the district board of education administration and the Commissioner of Education.
>
> (b) It shall be comprised of three major parts: records of receipt and expenditure accounts in accordance with recognized governmental accounting procedures; detailed budget and cost distribution records; and a schedule of physical property.

The subsections of this Administrative Code which follow, instructs the local board of education and its employees as to the records necessary for receipt and expenditure accounts, budget and cost distribution records, physical property records, accounting directions, supplies and equipment, bookkeeping and accounting forms, mechanical bookkeeping systems, among other things. These regulations give direction to the employees of the local board of education, presumably its Board Secretary, as to the method of bookkeeping and how the record function is to be incorporated within its business operation. Nothing in these regulatory provisions address the question of per diem allowances or expenditures.

It is observed here that both respondent, through its Brief in Support of Notice of Motion to Dismiss, and this administrative tribunal at oral argument;

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directed petitioner's attention to N.J.S.A. 18A:19-1 et seq., Expenditure of Funds; Audit and Payment of Claims. Petitioner ignored these directions and insisted that his cause of action arose under the provisions of N.J.S.A. 18A:4-14. Thus, petitioner having made a choice of law upon which he bottoms his complaint, must now accept a result which is consistent with a clear reading of the alleged violated statute, N.J.S.A. 18A:4-14.

Having carefully considered the statute and regulations I **FIND** and **CONCLUDE** that while it is possible for a board of education to be in violation of N.J.A.C. 6:20-2.1 et seq., which is not found here, it is not possible for such a local board of education to violate N.J.S.A. 18A:4-14 as alleged by petitioner. This statute, N.J.S.A. 18A:4-14, was directed exclusively to the State Board of Education by the Legislature enabling the State Board to prescribe a simple system of bookkeeping for the purpose of unifying school business accounts throughout the state. The State Board of Education is the only entity which could have violated the statute. It did not do so but, rather, promulgated N.J.A.C. 6:20-2.1 et seq. pursuant to its directive by N.J.S.A. 18A:4-14.

I **CONCLUDE** that the Barnegat Township Board of Education was not, nor could it have been, in violation of N.J.S.A. 18A:4-14 as alleged and asserted by petitioner.

I **CONCLUDE** that petitioner has not advanced a justicable controversy before the Commissioner in asserting a violation of N.J.S.A. 18A:4-14 by the Board. *Suggs.*

Accordingly, I **FIND** and **CONCLUDE** that petitioner has failed to state a cause of action cognizable before the Commissioner for which relief may be granted by the Commissioner. *Suggs.*

It is, therefore, **ORDERED** that Count I of the herein Petition of Appeal be and is hereby **DISMISSED**.

SANCTIONS

As observed in the Procedural Aspects of this matter, petitioner herein was subject to sanctions imposed by this tribunal, pursuant to N.J.A.C. 1:1-14.4(c)4, for

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petitioner's violation of R. 1:4-8. The sanctions were neither imposed lightly nor in a frivolous manner but, rather, after due notice and careful consideration. An elaboration of the Procedural Aspects and reasons for the sanction is required here:

During the course of this litigation, petitioner proffered a Notice of Motion to Amend the Pleadings and in so doing, personally delivered the moving papers to Board's counsel's office and workplace. While in Ms. Hofstetter's office and in the presence of a client of Ms. Hofstetter, petitioner made a statement directly to the client that was "inappropriate, scandalous, derogatory and despicable." Petitioner stated that Ms. Hofstetter had slept with an Administrative Law Judge on the night before the Judge had rendered a decision in Ms. Hofstetter's favor and adverse to petitioner. Board counsel recommended that petitioner, notwithstanding that he is a pro se litigant, be bound by appropriate rules of conduct with respect to his behavior towards his adversary (See Attachment A).

This court agreed and, by way of letter dated March 28, 1988, placed petitioner on notice that, among other things, he was subject to the control of this court by virtue of R. 1:21-1(b) which states:

> Appearance. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action (emphasis added).

In addition, petitioner was advised of the duty and obligations of the undersigned that the proceedings were to be conducted pursuant to those established rules of conduct, pursuant to R. 1.:18 Duty of Judges which provides that:

> It shall be the duty of every judge to abide by and to enforce the provisions of the Disciplinary Rules and Code of Professional Responsibility, the Code of Judicial Conduct and the provisions of R. 1:15 and R. 1:17.

Based upon the above, the undersigned advised petitioner that he would be bound by the standards under the Rules of Professional Conduct RPC 1.1 et seq. a breach of which could lead to sanctions imposed against him as provided by N.J.A.C. 1:1-14.6(j) (See Attachment B).

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In his subsequent Certification and Notices of Motion to disqualify the undersigned from hearing and determining the herein controverted matter, petitioner's Certification stated, in part, as follows:

> 9. I am in total believe (sic) Judge Law is very ill or he may be on some kind of illegal drugs to conduct the hearing ih (sic) such very poor manner to burder (sic) upon incompetence.
> ....
>
> 11. It is not the duty of Judge Law to object to witness unless he sleeps with that witness or got payed (sic) off to do so.
> ....
>
> 15. Judge Law together with Judge McKeown are the reason the OAL has gotten a bad name for itself.
>
> 16. I submit this Certification in the interest of justice and for a fair trial, while my advisary (sic) may try to buy a judge a (sic) will never do so.

During oral argument on petitioner's Notice to Disqualify the undersigned, petitioner admitted he had no basis in fact for the assertions as found in paragraphs 9, 11, 15 and 16 of his Certification.

Petitioner's Motion to Disqualify was dismissed with prejudice. This court then observed, among other things, that in the absence of any facts upon which petitioner based his assertions in the above paragraphs of his Certification together with the offense he visited upon counsel for the Board in his paragraph 16, it cited R. 1:4-8 which provides in pertinent part, as follows:

> The signature of an attorney or party pro se constitutes a certificate by him that he has read the pleading or motion; that to the best of his knowledge, information and belief there is good ground to support it; that it does not contain scandalous or indecent matter; ... (emphasis supplied).

Having then cited the dictionary definition of "scandalous" as libelous, defamatory and offensive to propriety or morality pursuant to *Webster's Ninth New*

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Collegiate Dictionary (1983 Ed), resort was also given to *Black's Law Dictionary* (Rev. 4th Ed), where it states:

> **SCANDAL.** Defamatory reports or rumors; aspersion or slanderous talk, uttered recklessly or maliciously.
>
> **Pleading**
>
> With reference to necessity of keeping court records free from scandal, an unnecessary statement which bears cruelly upon an individual's moral character, or statement of anything contrary to good members, or unbecoming court's dignity to hear or which charges some person with a crime not necessary to be shown in the cause. (citations omitted) (at p. 1510)

Based upon the fact that petitioner had been placed on proper notice that his behavior and conduct was subject to scrutiny and sanctions where it was found to be violative of any rule or regulation and having found and determined that petitioner's Certification contained scandalous matter in violation of R. 1:4-8; sanctions were imposed, albeit minimal, and limited to petitioner having to pay the Board's counsel for all fees and costs for counsel's time related to his Motion to Disqualify Judge Law, pursuant to N.J.A.C. 1:1-14.4(c)4 (See: Decision on Motion, issued May 6, 1988 Attachment D). Subsequently, counsel for the Board submitted an Affidavit dated May 9, 1988 to this court and petitioner which set forth her costs to be $171.41 (See: Attachment C).[2]

---

2. I am compelled to state a fact which may not be ignored. Subsequent to the close of the oral argument held on May 10, 1988, in the presence of the court reporter and Board's counsel, petitioner was reminded of his obligation to satisfy the imposed sanctions to which he replied, "Try to collect."

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The imposition of sanctions on a party litigant in a state administrative proceeding is a rare occurrence. Such an action by an administrative tribunal is taken only after thoughtful due consideration and circumspection. In the instant matter the action against petitioner is warranted by virtue of his demonstrated untoward behavior and conduct toward his adversary and this court. Petitioner has exhibited a total lack of respect for the dignity of his adversary and this court by his outrageous and contemptible statements, both oral and written.

Even after this tribunal placed petitioner on written notice that his conduct and behavior must comport with those standards of civility, petitioner ignored the notice and published his Certification which contained scandalous matter in defiance of the notice and in violation of R. 1:4-8.

Subsequent to his Certification petitioner again attempts to disparage his adversary and others in his brief in opposition to the Board's Motion to Dismiss. In his twisted convoluted syntax petitioner avers in his Statement of Law that: "No (sic) may commit an act of thief (sic) from the children of Barnegat without repayment of those monies. Nor may an attorney coverup for such acts." Petitioner's implication here is quite clear. Without any basis in fact, petitioner would have the world believe that counsel for the Board attempted to conceal or "coverup" an act of theft from the Board. It is not necessary to discuss the consequence of such an act if it were true. The fact remains that petitioner attempts to intimidate rather than elucidate. He purposely makes false, misleading and unsubstantiated statements which serves no purpose in these proceedings other than give petitioner some aberrant satisfaction.

A further example of misstatement of fact is found in petitioner's brief under Point II where he says: "Those safeguard (sic) are for the adequate financial information for the general public as well as the Commissioner of Education and school administato (sic) even through (sic) he has thru (sic) the years committed theif (sic) of thousands of tax dollars." Although we are not certain as to who petitioner asserts committed the alleged theft; i.e., the Commissioner or the school administrator, the fact of the matter is that petitioner makes the statement with impunity and without any facts to support the assertion.

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In the matter of *Larry S. Loigman v. Twp. Comm. of Twp. of Middletown and Elizabeth Novack, T/A Grand Cafe*, (OAL DKT. NO. ABC 6618-85, Appeal No. 5078, Final Order May 19, 1986), Alcoholic Beverage Control Director, John F. Vassallo, Jr. admonished appellant in his Final Order where he said:

> ... A. ADMONISHMENT TO APPELLANT
>
> Written exceptions to the Initial Decision were filed by the appellant as permitted by N.J.A.C. 13:2-17.14(d). Prior to dealing with the substance of the exceptions, I first must state my concern with and condemnation of some of the intemperate language used and assertions raised by the appellant in his exceptions. Although appellant has filed his appeal pro se, it is noted that he is an attorney admitted to practice of law in New Jersey. Never, during my tenure as Director, have we ever received exceptions containing such completely inappropriate and overly zealous statements and veiled threats, even among those filed by non-legally trained persons whose pecuniary interests potentially were being adversely affected by Division initiated proceedings. The appellant does an immense disservice to himself, his case, the Office of Administrative Law, and the administration of justice in his improper attacks. Indeed, I believe that it would be well within my authority to dismiss his exceptions without further comment because of his misstatements. [Cf., N.J.A.C. 1:1-3.1(a)3.]. Nevertheless, while I shall deal with the substance of his exceptions below, the appellant is admonished that any such further unfounded and intemperate attacks will result in the dismissal of any documents containing same filed with this Division and any other action which may be deemed appropriate. (Id. pp. 1,2)

Thus, Director Vassallo condemned appellant's language and placed appellant on notice that further unfounded and intemperate attacks would result in a dismissal of any documents containing such statements. Such a remedy is appropriate here where petitioner persists in asserting "unfounded and intemperate attacks" against his adversary and this administrative court.

Administrative sanctions are aimed at compelling compliance with noticed rules, regulations and/or orders of and by an administrative agency or tribunal rather than as a device to punish the disobedient party. This salutary purpose is

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analogous to, but not the same as, civil contempt proceedings where civil contempt generally involves vindicating the rights of the beneficiary of a judicially imposed order rather than assuring respect for the court as does criminal contempt (See: Charles H. Koch, Jr., *Administrative Law and Practice*, West Pub. Co. 1985, Vol. I. pp. 535-542). Civil contempt is remedial in purpose while criminal contempt is punative. The application of the imposed sanctions in the instant matter is more analogous to *Rule* 11 in the *Federal Rules of Civil Procedure.* Simply put, the rule applies to misconduct relating to the signing of a pleading, motion or other paper that is not well-grounded in fact and law. This is the blatant misconduct manifested by petitioner. Given petitioner's assertion, albeit off the record, that he does not intend to satisfy the herein ordered sanctions of $171.41 due and owing the Board's counsel, I Recommend that the Commissioner, pursuant to his discretionary authority under N.J.A.C. 6:24-1.9, dismiss any and all further actions brought by petitioner against the Barnegat Township Board of Education until such time as the sanctions are satisfied and disposed of.

ORDER

It is therefore **ORDERED** that petitioner Bernard Laufgas comply with this tribunal's **ORDER FOR SANCTIONS**, as set forth in the **DECISION ON MOTION** dated May 6, 1988.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 7673-87

I hereby FILE my Initial Decision with SAUL COOPERMAN for consideration.

13 July 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

JUL 18 1988
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:
Ronald D. Parks/KS
OFFICE OF ADMINISTRATIVE LAW

JUL 19 1988
DATE

dho

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BERNARD LAUFGAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY, AND FRANK L. NAPPO, BOARD MEMBER,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon his careful review of the record of this matter, the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law. Concerning Count I of the instant Petition of Appeal, the Commissioner adopts the finding of the ALJ that Barnegat Township Board of Education did not violate N.J.S.A. 18A:4-14, which requires the State Board of Education to establish a bookkeeping system and, thus, that petitioner has failed in his burden of proving that the local Board herein was in violation of said statute. He accepts as his own the reasoning of the ALJ in this regard. Moreover, the Commissioner dismisses as being without merit Count II of the instant Petition of Appeal which avers Mr. Nappo, a former Board member, is not an American citizen and, thus, he adopts the conclusion of the Office of Administrative Law as embodied in the initial decision, ante, wherein the ALJ concludes that

> [P]etitioner set forth no facts in support of his conclusions that Nappo was or is disqualified to hold an elected position with the Board. I CONCLUDE that petitioner's bare assertion that Nappo is disqualified, without more in support of that assertion, is insufficient to rise to a justiciable controversy. Suggs v. Bd. of Ed. of the Borough of Asbury Park, 1988 S.L.D. _____ (Commissioner's decision February 23, 1988).

Further, he adopts as his own, for the reasons expressed therein, the findings and conclusions of the Office of Administrative Law concerning the two motions brought in this matter: the first, the Board's motion to strike the amended petition which the ALJ granted on April 13, 1988; the second, petitioner's Motion to Disqualify ALJ Lillard Law, which was denied on May 6, 1988.

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Regarding the sanctions meted against petitioner in the ALJ's initial decision and Motion to Disqualify, the Commissioner does not adopt as his own the ALJ's conclusion assessing petitioner costs for respondent's counsel's time in defending such motion in the amount of $171.41, pursuant to N.J.A.C. 1:1-14.4(c)4 because pursuant to N.J.A.C. 1:1-3.2(c)4, the Director of the Office of Administrative Law, not the Commissioner, is deemed to be the Agency Head for purposes of review of sanctions under N.J.A.C. 1:1-14.4. It is therefore not within the Commissioner's jurisdiction to comment upon sanctions imposed by the ALJ. The Commissioner hereby directs a copy of this decision to the Director of OAL for his review of the sanctions issue.

Further, the Commissioner does not adopt the ALJ's added recommendation that pursuant to his discretionary authority under N.J.A.C. 6:24-1.9, the Commissioner should "dismiss any and all further actions brought by petitioner against the Barnegat Township Board of Education until such time as the sanctions are satisfied and disposed of" (see Initial Decision, ante), lest petitioner be denied due process. However, due to petitioner's outrageous accusation and proclivity for litigation, the Commissioner will carefully scrutinize any further matters that petitioner may advance against the Barnegat Board of Education to ensure that any claims brought before this tribunal by Mr. Laufgas are not frivolous or brought in bad faith solely for the purpose of harassing the Board and taxpayers of Barnegat. Cf. c. 46, L. 1988, approved June 28, 1988 (N.J.S.A. 2A:15-59.1), which provides for payment of costs and attorney fees in matters brought before the courts where

> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The Commissioner notes the ALJ's concern that petitioner may resist payment of such sanctions. The Commissioner's determination not to adopt the ALJ's recommendation to foreclose any further pleading from petitioner does not preclude the Board in this matter from seeking enforcement of the sanctions in an appropriate forum for such costs, should petitioner fail to meet his financial obligation of $171.41.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision, as modified herein.

COMMISSIONER OF EDUCATION

August 31, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5022-87
AGENCY DKT. NO. 197-6/87

PAUL GORDON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,
Respondent.

Karen L. Jordan, Esq., for petitioner (Greenberg & Prior, attorneys)

Glenn D. Curving, Esq., for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: June 23, 1988 Decided: July 27, 1988

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, Paul Gordon, is a tenured teacher employed by the respondent, Board of Education of the Township of Passaic, Morris County (Board). On March 31, 1987, the Board acted to withhold the petitioner's increment for the 1987-88 school year. This is an appeal by Mr. Gordon of the Board's action.

PROCEDURAL HISTORY

The petitioner filed his verified petition of appeal with the Commissioner of Education on June 25, 1987, alleging that the Board's withholding action was illegal, arbitrary, capricious, unfounded, in bad faith, and in contravention of *N.J.S.A.* 18A:29-14. An answer, denying the substantive allegations of the petition

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and asserting a separate defense, was filed by the respondent on July 16, 1987. On July 21, 1987, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 et seq.

A telephone prehearing conference was held on December 22, 1987, following several adjournments, judge changes and substitution of an attorney for the Board. A prehearing order was entered, defining the issues to be decided, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

The three-day hearing was held on March 14, 15 and 16, 1988, in the Municipal Court of the Borough of Chatham, Morris County. Four witnesses testified for the Board. The petitioner called one witness and testified in his own behalf. A large number of documents were marked in evidence, as identified on the Exhibit List attached to this decision. Post-hearing briefs were filed by both parties, and the record closed on June 23, 1988, when the last paper was filed in this matter.

ISSUES

The issues to be resolved, as set forth in the prehearing order, are as follows:

1. Whether the action of the Board was patently arbitrary, without reasonable basis, or induced by improper motives.

2. Whether the Board failed to comply with the statutory requirement that written notice of its action be served on petitioner within ten days.

3. If petitioner prevails, what is the appropriate remedy?

DISCUSSION OF THE EVIDENCE AND TESTIMONY

A joint **Stipulation of Facts** was entered into by the parties and placed on the record (Exhibit J-1) at the beginning of the hearing:

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1. Petitioner, Paul Gordon, is a tenured teaching staff member employed by respondent Board of Education of the Township of Passaic.

2. Respondent is responsible for the operation and supervision of all schools within the Passaic Township School District.

3. Respondent, by open public roll call vote, voted to withhold petitioner's increment for the 1987-88 school year.

4. Petitioner, Paul Gordon, possesses a valid secondary school teaching certificate which includes an endorsement in instrumental music received in 1971 and a comprehensive music endorsement received prior to the 1984-85 school year. He received an elementary school certificate in May, 1980.

5. Petitioner was employed as a teacher of instrumental music by respondent from 1968 to 1978. Mr. Gordon lost his job in 1980 pursuant to a reduction in force.

6. As a result of litigation before the Commissioner of Education, he was reinstated to a position of music teacher and returned to work as a music teacher at the Central School on September 24, 1986.

7. Mr. Gordon was observed and evaluated on October 10, 1986 and observed on November 26, 1986, February 2, 1987, March 23, 1987 and June 5, 1987.

8. Mr. Gordon was notified of the decision to withhold his increment for the 1987-88 school year in a letter dated April 6, 1987.

Vito D'Alconzo, principal of the Central Middle School in which the petitioner teaches, testified for the Board in favor of the increment withholding action. Mr. D'Alconzo is Mr. Gordon's supervisor, and he is responsible for teacher evaluations. Mr. D'Alconzo explained that Mr. Gordon is an instructor of the

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instrumental music program and director and teacher of vocal music. The first school year in which he supervised the petitioner was 1986-1987. It was during this year that he recommended that Mr. Gordon's increment be withheld for the following year, 1987-88.

The bases upon which the recommendation was made, according to Mr. D'Alconzo, were failure to teach the curriculum, failure to submit lesson plans, poor teaching style and techniques, failure to adhere to administrative directives and failure to be in class on time. In his testimony, Mr. D'Alconzo utilized documentary exhibits to supply particulars of the reasons for the withholding action.

Referring first to Exhibit J-2, a classroom observation report dated October 10, 1986, Mr. D'Alconzo commented there that the petitioner did not have lesson plans available; that there was a minimal amount of interaction between students and teacher, the lesson being a totally teacher-dominated session; and that Mr. Gordon was almost four minutes late to class.

Approximately a month later, in November 1986, another classroom observation report, Exhibit J-4, contained comments by Mr. D'Alconzo indicating that the lesson plan should have been more detailed. However, the report was generally favorable, stating that the students were ready to play their instruments and reviewed sheet music while waiting for the teacher and that the teacher played with the students during the observation period. The report also indicated that the teacher critiqued the students' playing throughout the observation.

However, in February 1987, another classroom observation report was unfavorable (Exhibit J-3). Mr. D'Alconzo stated that the beginning of the period was chaotic and that six to eight students came in late, without excuses. (When cross-examined about this, Mr. D'Alconzo acknowledged that there had been a change in room assignment on the day of the observation because of damage to the room in which the class is usually held. It was true that some of the students reported to the first room initially, evidently not knowing of the room change.) He also indicated that students responded to Mr. Gordon's questions, although many had no previous knowledge of what was being discussed. Observing that two students blurted out rude, inappropriate responses, the supervisor wrote that Mr. Gordon was patient

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with them. A comment relating to evidence of planning in the lesson stated that the teacher's plan book did not contain any of the matter presented and that the lesson was teacher-dominated rather than containing appropriate student-teacher interaction. Mr. D'Alconzo criticized Mr. Gordon's teaching effectiveness in the observation report, stating that rules and expectations should be established and that condescending remarks tend to alienate the students. Continuing, the principal wrote that remarks made by the petitioner were far above the students' heads, and the piano and desk blocked easy access to the board. Mr. D'Alconzo suggested that better time on tasks should be utilized and that the class had too much time left at the end of the period. He further wrote that musical examples of terms discussed would have made the lesson more meaningful to the students.

Exhibit J-5 is the annual teacher evaluation report containing 12 individual criteria used to rate or evaluate the teacher. Mr. Gordon was rated unsatisfactory on most of the items. A further paragraph containing additional comments stated that Mr. D'Alconzo was greatly concerned over Mr. Gordon's inability to control and teach a class. He wrote that the petitioner's teaching style and his relationship to and understanding of students is "suspect" and that he could not recommend Mr. Gordon for a salary increment for the 1987-88 school year. Seven of the twelve criteria were marked unsatisfactory. (Exhibit J-5 is erroneously dated 2/12/85, instead of 1986.)

Mr. D'Alconzo then furnished details relating to the eight critical items listed by the Board in its April 6, 1987 letter to the petitioner informing him of the increment withholding action, Exhibit J-10:

The first shortcoming mentioned was in preparation of lesson plans. The principal was particularly critical of Mr. Gordon's frequent neglect in submitting written evidence of his weekly lesson plans so that the supervisor could follow the teaching progress from week to week. Mr. D'Alconzo stated that the petitioner only sporadically complied with the requirement to submit a plan book each Friday, and there were eight weeks during which the plan book was not submitted. The principal also testified that even on the days when the lesson plans were submitted, they were not in compliance with requirements.

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On November 25, 1986, Mr. D'Alconzo directed a memo to Mr. Gordon (Exhibit R-2) containing concerns raised regarding his teaching performance. One paragraph of this memo directed the petitioner to submit a plan book each Friday in forthcoming weeks to include not only detailed vocal music plans, but also plans for each instrumental music period taught. On December 15, 1986, a follow-up memo was sent to the petitioner by the principal reminding him of the plan book requirement listed in the November memorandum. Exhibit R-3 stated that, "to date, December 15, 1986," Mr. Gordon had not complied with this request. The petitioner was asked to submit the information to the principal before the end of the day, and he was thanked for his anticipated cooperation.

The second item in the Board's letter to Mr. Gordon, Exhibit J-10, stated that he did not start classes on time. In his testimony, Mr. D'Alconzo referred to a memo he wrote to the petitioner on October 8, 1986, expressing dissatisfaction with his continued late arrival in classes on too many occasions. This memo was strongly worded and informed Mr. Gordon that it was his obligation to adhere to the schedule, as well as to his other assigned duties. Mr. D'Alconzo wrote that if the petitioner was not on duty as assigned, it would be considered dereliction of duty and insubordination. This memo, Exhibit R-4, also contained other factors with which the principal was dissatisfied.

The Board's letter to petitioner further stated that Mr. Gordon had not satisfactorily delivered the prescribed course of study (presumably to his students). Mr. D'Alconzo testified that Mr. Gordon had difficulty with the contents of the curriculum and did not comply with it. Mr. D'Alconzo said that after he discussed this matter with Mr. Gordon, he asked the petitioner if he would offer some suggestions as to how the curriculum might be changed or improved. According to the principal, the petitioner did not come forward with any such suggestions.

The letter to petitioner also stated that the petitioner did not employ a variety of teaching approaches. Mr. D'Alconzo testified that Mr. Gordon's personal improvement plan (PIP) requires him to address all of the students' needs and in proper teaching style (Exhibit R-1). According to the principal, the petitioner did not comply with directives relating to a variety of teaching approaches that would be suitable to all of the students.

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The fifth item set forth in Exhibit J-10 found fault with the manner in which the petitioner conferred or failed to confer with students and parents on individual progress. Mr. D'Alconzo testified that he directed Mr. Gordon to hold such conferences with the students and their parents, but in his opinion the petitioner did not deal with this requirement promptly enough or at all. In addition, he received notice that there had been some confrontations with students and that Mr. Gordon did not follow up with the usual disciplinary procedures. Mr. D'Alconzo said that he discussed this problem with Mr. Gordon, but there was no improvement.

The sixth criticism of the petitioner in the Board's letter referred to his failure to adhere to schedules. Mr. D'Alconzo testified that Mr. Gordon had much difficulty in this area, and he referred to a memo he wrote to the petitioner on October 10, 1986, Exhibit R-5, in which he asked Mr. Gordon to notify him of schedule changes so that the students' daily schedules could be satisfactorily planned. According to the principal, Mr. Gordon did not comply with this request for advance notification except on a few occasions. Mr. D'Alconzo testified that the petitioner still changed students' schedules unilaterally on many occasions without notifying him or the administrative office. The principal further stated that he sent additional memoranda to Mr. Gordon regarding the scheduling problem, and there were several verbal exchanges, but the problem remained. The reason for this difficulty was that Mr. Gordon was supposed to set up a rotating schedule so that each student was not taken out of the same class too often for specialized music instruction, and these rotating schedules were to be sent to the principal for approval. Mr. D'Alconzo said that the petitioner still did not construct the rotating schedules correctly, despite the many reminders.

Speaking of another problem relating to schedules or timeliness, Mr. D'Alconzo testified that the petitioner had difficulty adhering to arrival times when he was assigned to bus duty, and he was often late for his classes. The principal also referred to a memorandum he sent the petitioner on March 4, 1987, Exhibit R-6 (written after the decision was made to recommend withdrawing of the increment). This memo discussed a problem that occurred regarding arrangements petitioner failed to make for a bus pickup of a group of students. According to Mr. D'Alconzo, an office secretary was compelled to handle the matter although it was Mr. Gordon's responsibility. Exhibit R-7 is another memo written to the petitioner by the principal

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relating to a failure to follow schedules. However, this, too, was written by the principal after he decided to recommend withholding of the increment.

The seventh reason given by the Board in its written advice to the petitioner in Exhibit J-10 was that he did not properly or satisfactorily assume specific assignments, such as bus duties. Mr. D'Alconzo said that the need to adhere to such assignments was specifically stated in the PIP, Exhibit R-1. Giving an example of this problem, the principal referred to a direction in the memo he sent to Mr. Gordon on October 8, 1986, Exhibit R-4, that the petitioner tape record lessons for a blind student. According to Mr. D'Alconzo, it was not done on a timely basis. The principal further testified that Mr. Gordon failed to give the student's mother the appropriate sheet music so that she could work with her son in conjunction with the tape recording. Mr. D'Alconzo referred to two memos he wrote to petitioner on the subject, Exhibits R-8 and R-9. Mr. D'Alconzo testified that the petitioner was dilatory and did not comply with the directives.

The last item mentioned by the Board in its advice to the petitioner in Exhibit J-10 was that he did not satisfactorily improve class management techniques after being directed and reminded to do so. Mr. D'Alconzo testified that, for example, Mr. Gordon was asked to attend some workshops on discipline to help him in class management techniques. According to this testimony, Mr. Gordon still failed to follow suggestions and recommendations, even after these sessions.

Mary Louise Malyska, assistant superintendent for curriculum and special services in the Passaic Township school system, testified that she was the acting superintendent at the time Mr. Gordon's increment was withheld by the Board. Although she never knew the petitioner or had any dealings with him before, she stated that, acting on Mr. D'Alconzo's recommendation, she recommended the withholding to the Board. However, before doing so, she conferred with Mr. D'Alconzo and reviewed the final evaluation and other pertinent documents with him, on a point-by-point basis. Ms. Malyska testified that she then met separately with Mr. Gordon, who asked her to reconsider her decision. She did so and reviewed the documentation again. However, Ms. Malyska testified that she was compelled to agree that Mr. D'Alconzo was correct. She felt that the students were not being

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taught properly, that lessons were not being taught to the curriculum, that lesson plans were not being properly documented and that the style of teaching was not proper. Referring to the lesson plans, Ms. Malyska stated that they did not represent the curriculum and were not supportive of the curriculum. She said that Mr. Gordon told her the curriculum was haphazard, ridiculous and unteachable. She replied that it was his duty to teach it in accordance with the Board's approval, but she asked him to submit suggested modifications, which he never supplied.

Ms. Malyska testified that Mr. Gordon acknowledged that he had forgotten to submit lesson plans on at least 12 weekly occasions. When she submitted her recommendation for the increment withholding to the Board, she supplied the Board with all of the supporting documentation that she reviewed, including memoranda, observation reports, lesson plans and the final evaluation. The Board was unanimous in its decision to affirm the recommendation of the acting superintendent and principal.

Ms. Malyska was a credible witness. She testified again in rebuttal following Mr. Gordon's testimony in which he attempted to controvert much of her earlier testimony. The information she imparted in rebuttal will be referred to below, after discussion of the petitioner's testimony.

In his testimony, the petitioner addressed each of the eight items the Board referred to in Exhibit J-10 as indications of his unsatisfactory performance:

Mr. Gordon denied that he did not present the principal with weekly lesson plans, saying that he only occasionally failed to do so. He said that the plan book was kept on top of his desk so that the principal could always have looked at it himself. Mr. Gordon stated that he had a lesson plan for everything he taught during the entire year, beginning on October 6th. He felt that Mr. D'Alconzo was harassing him about this. The petitioner also denied telling Ms. Malyska that he forgot to submit lesson plans on 12 occasions. The petitioner's best estimate was that he forgot to submit them two to four times and that the administrator's concentration on the subject was a finely orchestrated conspiracy to ridicule and impugn him.

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The petitioner also testified that he does not recall being given the curriculum in October 1986, as claimed. (The memo from Mr. D'Alconzo to Mr. Gordon, dated October 8, 1986, Exhibit R-4, recites that the music curriculum was placed in the petitioner's mailbox on October 8.) Mr. Gordon testified that he looked for it after he received the memo but could not find it and therefore assumed he never got it. He further claimed that he never saw the curriculum until February 1987.

The petitioner acknowledged that there were occasions when he had been late to class. However, he attributed this to poor administrative planning. According to Mr. Gordon, he was assigned to outdoor lunch period duty before class, and he needed time afterward to return indoors, pick up his materials and then move to the other side of the building. The petitioner stated that the problem ended in the beginning of February 1987 when the instrumental music room, which was more advantageously located, began to be used.

Replying to the criticism about his failure to deliver the prescribed course of study, the petitioner testified that he found the curriculum or course of study to be incomprehensible and impossible to implement. He further stated that he was never given any course materials, and the bare outlines of the curriculum were missing many necessary details. For example, Mr. Gordon said that the curriculum indicates that the sixth grade should be taught music composition using the 12-tone row and serial technique. Mr. Gordon said that this is far too sophisticated for sixth grade students, and he likened it to teaching advanced calculus or molecular biology to sixth graders. He insisted that these students, who are generally 12 years old, were not ready for such complex musical theory because they had little prior training. He was unable to envision teaching such an advanced subject matter so early in the educational process.

Mr. Gordon testified that his principal insisted that he follow the curriculum in any event. He further stated that he was told to teach only contemporary music, limited to rock and roll. Mr. Gordon did not agree that such an approach made sense because, in his opinion, contemporary music does not consist solely of rock and roll. He tried to include other music composed or performed in more recent times, such as Broadway show music and George Gershwin compositions. The petitioner's goal was to teach the students to be discriminating

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listeners, even using more contemporary music. Mr. Gordon repeated his complaints that whenever he asked for teaching materials such as recordings, composer biographies, texts and audiovisual equipment, they were not supplied, but instead he was merely told that he was not conforming to the curriculum.

Responding to the criticism by the Board that he did not employ a variety of teaching approaches, Mr. Gordon testified that he used many approaches, such as lectures, questions and answers, brainstorming and demonstration with audiovisual equipment, although he was compelled to bring his own because the materials supplied were inadequate.

The fifth item contained in the Board's list of criticisms (Exhibit J-10) was that the petitioner did not satisfactorily confer with students and parents on individual progress. Mr. Gordon denied that this was so, stating that he regularly engaged in such conferences. He did acknowledge that once, by mistake, he called a student's home and spoke to a babysitter instead of the parent, and that on another occasion when a parent was not home, he spoke to the student directly.

Addressing the claim that he failed to adhere to schedules (paragraph six in Exhibit J-10), Mr. Gordon testified that the problem was grossly exaggerated and that some directives were given him that were intentionally difficult to follow. He considered this to be a form of harassment. The petitioner said that he was compelled to constantly reorganize things and make changes to suit individual students at different times, often depending on the progress of the students. This meant that sudden schedule changes were often necessary. Even so, Mr. Gordon stated that he often tried to notify the principal of schedule changes in advance, but he said that on many occasions Mr. D'Alconzo was not present to receive the change.

The petitioner had taught in the respondent school district for many years prior to 1980-81, when he left following a reduction in force. He returned for the 1986-87 school year following litigation and a decision in his favor, which ruled that he was entitled to a new position created in 1982-83. According to Mr. Gordon's testimony, when he first arrived back to work in September 1986, the principal, Mr. D'Alconzo, told him that he would be looked at through a magnifying glass. From that time on, Mr. Gordon felt that he was a target.

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Replying to the charge in paragraph 7 of Exhibit J-10 that he did not satisfactorily assume specific assignments such as bus duties, Mr. Gordon claims that some of these duties were heaped on him to excess, which was part of the harassment he was subjected to by the principal, who he felt wanted to make life as difficult as possible for him. The petitioner also denied that he did not properly handle the special work to be given the blind student, as Mr. D'Alconzo testified. Mr. Gordon claimed that he did a great deal of extra work for this student, that he was very sensitive to his needs and that he went out of his way to accommodate him. He said it was wrong for the principal to infer that he was mishandling the assignment.

Responding to the criticism relating to his class management techniques (paragraph 8 in Exhibit J-10), the petitioner responded that some of the students were arrogant and had a derogatory attitude towards him, which he felt reflected the same views held by the principal.

Mr. Gordon testified additionally that Mr. D'Alconzo had organized a student effort to ridicule him. He said that he became the subject of laughter by a group of students on May 28, 1987, when he entered a classroom and saw that the eighth grade class was in the midst of producing a videotape sketch featuring a nearly life-sized dummy called the "Grand Band Man," giving music lessons. The dummy spoke (through the voice of a student) with an accent similar to the petitioner's Middle European inflection. Mr. Gordon found out that the dummy had first been called "Gordonia." The sketch was the product of a Junior Achievement class project, and Mr. Gordon did not know when it was taped. However, he felt that it had to have been carefully organized and prepared for a long time before May 28, which was after the withholding action taken by the Board. The petitioner also noted that his band music was being played in the background while the dummy spoke.

Mr. Gordon testified that some students told him that Mr. D'Alconzo originated the idea of the dummy and encouraged it. He felt that the students were being manipulated and influenced to make him unpopular and unacceptable and to appear weird and dumb.

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The videotape, Exhibit P-5, was viewed as part of the hearing. The tape was played in chambers pending a decision as to its admissibility, and it was later marked in evidence. The Junior Achievement project was organized by a group of eighth grade students as an educational project aimed at teaching them how to engage in a business. The project chosen was the production, advertising and sale of a large doll or dummy called the "Grand Band Man." The demonstration model, approximately three to four feet in height, had an Eastern European accent, and it was claimed that he could play musical instruments and sing scales and songs, such as "Mary Had a Little Lamb." The four male students demonstrating the model dummy, which was dressed in a jacket and tie, hit and beat it in a demeaning manner. Instrumental band music was playing in the background while the advertising claims and demonstration was going on. The dummy was advertised as a facsimile that would presumably be mass-produced for sale at $24.95. There was little doubt that the petitioner, his accent and his function as teacher of instrumental band music, was the model used in this project.

N. Lawrence Scala, president of the Passaic Township Education Association and petitioner's co-worker, testified that he was present on March 21, 1987, when Mr. Gordon met with the Board to discuss his evaluation and recommended increment withholding. According to Mr. Scala, Mr. Gordon was not given enough of an opportunity to respond adequately, and all of the negative observations were clumped together.

The respondent presented several rebuttal witnesses in an attempt to reply to Mr. Gordon's testimony and accusations. The principal, Vito D'Alconzo, testified again and insisted that he gave copies of the curriculum to the petitioner three times, the first occasion being on the day Mr. Gordon arrived to begin the school year on September 4, 1986. Referring to his impression of contemporary music that should be taught as part of the curriculum, Mr. D'Alconzo said that, in his opinion, such music includes anything written from the period of the Civil War to date, including jazz, ragtime, theater and gospel, as well as rock and roll. He did not agree that he insisted that only rock and roll should be taught. He also stated that the supply of teaching materials available to Mr. Gordon was no different from the supplies provided other teachers in prior years. When he asked the petitioner to give him a list of materials he needed, he did not receive it until April 1987.

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Mr. D'Alconzo also said that there was a standard procedure for getting equipment, which Mr. Gordon did not often follow.

On the subject of scheduling, the principal repeated that the requirements had to be explained to Mr. Gordon over and over, and he still handled it in a confusing manner.

Mr. D'Alconzo also spoke about the Junior Achievement project. He testified that he did not ordinarily get involved in the theme or idea of the project. On this occasion, the project was guided by an outside executive from AT&T. The principal said that he had no prior knowledge of the subject, and he walked into the room only for about three or four minutes when the videotape was being played. Mr. D'Alconzo further testified that he saw Mr. Gordon laughing about it in the hallway afterward and that Mr. Gordon only became upset about it days later. The principal then spoke to the students and to the faculty advisor, Guy Buffone, who apologized to Mr. Gordon. The students were also compelled to apologize. Mr. D'Alconzo said that Buffone was the model used for the dummy, not Mr. Gordon. (However, see the testimony of Mr. Buffone, below.) He also said that work began on the project about two weeks before the tape was shown, after the Board voted to withhold the petitioner's increment.

Guy Buffone, a seventh and eighth grade social studies teacher at Central Middle School, also testified. He was the coordinating teacher for the Junior Achievement Program, which was primarily guided by an executive sent to the school by the Junior Achievement organization. He confirmed that the principal had little role in the project and did not screen it. Mr. Buffone said that only he and the executive from AT&T were concerned with the subject being presented.

However, Mr. Buffone had been told earlier that the subject for the project was a frustration doll called "Gordenia." He told the students three or four days before the presentation that they were not to make any references to Mr. Gordon, the band or any faculty member, and he passed word of this prohibition on to the AT&T executive. However, according to Mr. Buffone, the entire production developed rapidly, in the three or four days before May 28. He first became aware of the fact that the doll was being called "Grand Band Man" at the time the

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presentation began. After it was over, he spoke strongly to the AT&T executive and told the students they would receive an unacceptable grade and the project would not be counted for a prize. The students were required to apologize to Mr. Gordon, and an inquiry was held by the Board of Education.

Mr. Buffone acknowledged that the students violated his instructions during the three or four days it took to produce the videotape, and he did not know it until it was played on May 28. He stated that basically the AT&T executive was in charge. Mr. Buffone testified that a Junior Achievement project such as this usually took more than three or four days to produce and he had assumed that the students were not going to complete the assignment when they had nothing ready one week before the 28th. During the few days before that date, the students were very vague, and he had no idea of the production that was hurriedly put together.

Richard F. Ledder, a teacher of music to grades K to 8 at three schools in the respondent district, including Central Middle School, testified that he discussed the music curriculum with Mr. Gordon two or three times during the fall of 1986 and that Mr. Gordon tried to dispute any point he called to his attention. Mr. Ledder said that he advised the petitioner to comply and use the curriculum, even if he felt it was too difficult or impractical. He also advised him of the availability of supporting materials, such as library books and audiovisual equipment. According to Mr. Ledder, he gave this advice to the petitioner before February 1986.

Mr. Ledder taught the same curriculum that was objected to by the petitioner for ten years prior to the 1986-87 school year, and he testified that he had no difficulty with it. He acknowledged that he is one of the authors of the curriculum, and he has made additions and corrections to it from time to time. The major thrust of Mr. Ledder's testimony was that he was able to work with the curriculum that was rejected by the petitioner, and he found Mr. Gordon to be resistant to it when he tried to help him.

Mary Louise Malyska also testified again in rebuttal. She confirmed that curriculum guides were always provided for every teacher at the beginning of each school year. This was particularly true in the beginning of 1986 because the State Board of Education was monitoring the system, and it was important that a copy of

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the curriculum be located in each classroom for the monitor's use. The monitoring took place over a period of three days beginning on September 28, 1986.

Referring to the disputed curriculum, Ms. Malyska agreed that it seemed repetitive in some aspects, but she did not think it was hard to follow or hard to teach.

Ms. Malyska inspected Mr. Gordon's plan book (Exhibit P-1) and found that there was no continuity or logical progress relating to the curriculum in the successive plans, and it appeared to her that all grades were receiving the same lesson. She said that he made no comments in the plan book and no details were included. In her opinion, too many elements were missing from the daily notations, and it was difficult to tell if he was or was not following the lesson plans. Ms. Malyska said that the lesson plan book is used to provide the evidence that the subject is being taught properly.

Addressing Mr. Gordon's asserted difficulties in obtaining suitable equipment, Ms. Malyska testified that she found out the petitioner had brought his own stereo equipment into the school to use in his classes because he was dissatisfied with or was unable to obtain such equipment from the school. Ms. Malyska said she asked the petitioner to submit a receipt for payment for his equipment, but he has not done so.

Commenting about the testimony of N. Lawrence Scala, who said that Mr. Gordon was not given enough opportunity to respond adequately during his meeting with the Board on March 21, 1987, Ms. Malyska disagreed, stating that Mr. Gordon was not cut off in his remarks and was given substantially more speaking time than the two to five minutes he claimed. She offered to have a tape of the meeting transcribed and provided as evidence, if needed.

FINDINGS OF FACT

Having heard the testimony and observed the witnesses, and having reviewed the exhibits and considered the proposals of counsel, I **FIND** the following facts, by a preponderance of the credible evidence:

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1. The eight joint stipulations of fact listed above are included herein.

2. Written curriculum guides for petitioner's classes were given to him in September 1986, at the beginning of the 1986-87 school year, and at least once again in the months thereafter.

3. Petitioner did not agree with the curriculum. He thought it was haphazard, impossible to teach and incomprehensible.

4. To a great extent petitioner did not follow the curriculum. His teaching, although containing meaningful elements, reflected his resistance to and disagreement with the curriculum.

5. Petitioner was spoken to by his supervisors and associates on many occasions about his departures from the curriculum, but he did not substantially correct the situation during the year in question.

6. The curriculum was not perfect. To some extent, it was repetitive and it sometimes contained difficult and inappropriate elements. However, it was capable of being followed and taught, and the same curriculum had been previously taught by others. Petitioner did not offer any concrete and organized suggestions for change or improvement when invited to do so.

7. The petitioner did not, on more than several occasions, submit his daily lesson plans to the principal, as required and requested .

8. Petitioner's daily lesson plan book was poorly kept (Exhibit P-1). The notes lacked sufficient comments and references to the curriculum to show how the lessons were being taught. It was often difficult to tell exactly what was being taught by looking at the entries in the book.

9. The petitioner had difficulty complying with procedures relating to the arranging and changing of students' schedules, and on some occasions this caused administrative problems.

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10. Petitioner was often unable to follow the procedures required for him to obtain sufficient materials and supplies.

11. The petitioner was sometimes unjustifiably late for class or for special duties, such as bus duty. Much of this was due to a lack of personal organization on his part.

12. The petitioner's teaching style and technique sometimes failed to hold the students' interest and attention, resulting in difficult behavior or lack of involvement by some of the students.

13. The reprehensible Junior Achievement project took place after the recommendation and decision had been made to withhold petitioner's increment.

14. The Board voted on March 31, 1987 to withhold petitioner's increment, after he was given an opportunity to be heard. Written notice of the Board's action was sent to the petitioner six days later, in a letter by the president of the Board, dated April 6, 1987 (Exhibit J-10). The letter erroneously stated that the Board's action was taken on March 23. A subsequent letter was sent to the petitioner by the secretary of the Board on April 23, 1987 (Exhibit J-11) to correct the error.

ARGUMENTS OF COUNSEL

The petitioner claims that the withholding of his increment for the 1987-88 school year was illegal, arbitrary, capricious, unfounded, in bad faith and unreasonable. Respondent disagrees, arguing that the Board's action was proper and must be affirmed.

Petitioner also claims that the Board improperly withheld the increment by failing to provide him with written notice of its action within ten days of its decision, contrary to the statutory requirement. The respondent disputes this contention.

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Lastly, the petitioner argues that the only increment withholding issue to be considered relates to his employment increment, but not the adjustment increment, because both forms of increment were not separately specified in the action taken or in the notice given to petitioner. The respondent essentially agrees with this contention, stating that the only increment withheld was petitioner's employment increment; an adjustment increment was not withheld because petitioner was not entitled to it in any event.

LEGAL DISCUSSION

A single statute controls a decision by a board of education to withhold a teacher's increments:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within ten days, to give written notice of such action, together with the reasons therefor, to the member concerned. . . .
> *N.J.S.A.* 18A:29-14.

A leading case defining the factors to be weighed by the Commissioner of Education with respect to an increment withholding is *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960). The court there stated:

> [T]he scope of the Commissioner's review is, as respondents say, not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions. . . .[T]he burden of proving unreasonableness is upon the appellant.
> *Id.* at 296-297.

The foregoing standards have been analyzed and commented upon frequently:

> The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the

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> quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or the bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the board. *Board of Education, Bernards Township v. Bernards Township Education Association*, 79 *N.J.* 311, 321 (1979).

Based on the foregoing, the only question open for review is whether the Board had a reasonable basis for its factual conclusions. One who challenges the action of a board that has withheld a salary increment must sustain the ultimate burden of demonstrating that the complained of withholding was arbitrary, capricious or unreasonable because the board did not have a reasonable basis for its factual conclusion. The Board's determination may not be otherwise reversed.

Furthermore, it has been held by the Commissioner of Education that "justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents." *Myers v. Glassboro Board of Ed.*, 1966 *S.L.D.* 66, 68. *See also, Rosania v. Board of Ed. of the Borough of Middlesex, Middlesex County*, OAL DKT. NO. EDU 5723-87 (Dec. 14,1987), OAL DKT. NO. EDU 5303-86, remanded, mod., Comm'r. of Education, January 22, 1988.

On the question of identification of the increment being withheld, the petitioner is correct in his contention that by merely voting to deny petitioner's "increment," the respondent has not acted to withhold petitioner's adjustment increment. *Ferraiolo v. Kinnelon Borough Board of Education*, 1 *N.J.A.R.* 427(1980); *Ormosi v. Board of Education of the Township of Kingwood, Hunterdon County*, OAL DKT. NO. EDU 2726-79 (May 29, 1980), adopted N.J. Comm'r. of Education, July 15, 1980; *Rosania*. In post-hearing correspondence respondent clarifies its action, stating that the only increment the Board intended to withhold from Mr. Gordon for the 1987-88 school year was his employment increment. Therefore, any argument relating to this contention by petitioner is moot.

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It has been found as a FACT that the Board voted to withhold petitioner's increment on March 31, 1987, not March 23, 1987 as erroneously stated in the notice to petitioner. It has further been found that the petitioner had full knowledge of the Board's action on March 31 because he was present at the meeting and discussed the forthcoming action with the Board at that time. The letter from the Board notifying him of the action was dated April 6, 1987, six days later, and well within the ten-day limitation set forth in the statute.

There was no testimonial evidence at the hearing from either party relating to the mailing or other manner of service of the notice on the petitioner; nor did he shed any light on exactly when or the manner in which he received it. The only statement regarding Mr. Gordon's receipt of the notice is contained in his post-hearing brief, which is not evidential. We do not know if the notice was delivered to the post office and mailed to petitioner at his home or if it was put into his internal mailbox at school. We also do not know if the mailing or attempted delivery was made on April 6, when the letter was presumably written.

Considering the lack of information indicated above, ordinary presumptions must prevail. Absent a statute or contract provision mandating a specific method of giving notice, the general rule is that there is a presumption that mail correctly addressed, stamped and mailed was received by the party to whom it was addressed. This presumption is rebuttable and may be overcome by evidence that the notice was never in fact received. *Szczesny v. Vasquez*, 71 *N.J. Super.* 347, 354 (App. Div. 1962).

Aside from the delivery question presented above, it has been held that substantial compliance with the notice requirement may be sufficient, superseding the stricter mandate set forth by the Commissioner of Education in *Holly v. Board of Ed. of Passaic*, 1978 *S.L.D.* 442. More recently, the Commissioner of Education has held that the substance of the notice requirement is satisfied when the individual affected is informed of the reasons for the action, whether before or after the board's vote, as long as the individual is apprised of the reasons no later than ten days after the official action. *Daily v. Rivervale Board of Ed.*, OAL DKT. NO. EDU 5376-86 (Jan. 29, 1987), aff'd. Commissioner of Education (March 24, 1987).

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In his decision, at pages 21 and 22, the Commissioner observed that the principal had constructive notice of the deficiencies far in advance of the Board's action. It appears that while the Commissioner has strongly discouraged the use of substantial compliance, he will condone it when it appears that adequate notice has been given.

CONCLUSIONS

The findings of fact above clearly outline deficiencies that existed in the petitioner's performance as a teacher. However, it is not a simple black-and-white picture. Teaching grade school courses requires a relatively disciplined format, as is found in a curriculum guide. Mr. Gordon had some difficulty following that format, although there is no question that he was acting in complete good faith and sincerely desired to provide his students with a complete and cultured musical education. A great deal of misunderstanding existed among the people involved in this matter. Having returned from a long period of layoff, Mr. Gordon was somehow convinced that he was being made the victim of administrative animosity. The petitioner is an obviously well-intentioned and sensitive individual, with a great deal of pride, dignity and musical knowledge. His European manner and accompanying accent made him appear to be different, and it is obvious that he did not blend facelessly into the homogeneous suburban educational setting. This may have made the more conventional administrators somewhat uncomfortable. Mr. Gordon's sensitivity and pride led him to believe that he was being unfairly harassed and discriminated against. However, there was no evidence of any such attitude on the part of his superiors, although they could have done more to understand and protect him from the rudeness that often accompanies people who are different. Under the circumstances, greater efforts should have been made to help him realize that certain guidelines, routines, and disciplines had to be followed, even in the face of disagreement.

All of the foregoing lends some comprehension to the sources of the dispute which unfortunately produced the Board's withholding action. Hopefully, it will not continue. However, the essential facts support the Board's decision, and those facts must be used to support the conclusion stated below.

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The "Grand Music Man" episode was shameful, and the Board cannot wash its hands of it and pass off responsibility to an outside consultant. It was a school program, conducted in and by the school. The production was a blatant and open ridicule of a teacher, including demeaning references to his foreign extraction and mimicking of his accent. Although it took place after the increment withholding action and is thus not directly relevant to the conclusion herein, the event is an indication of the gulf of misunderstanding that should be closed by the parties.

It is therefore **CONCLUDED** that the petitioner has failed to prove, by a preponderance of the credible evidence, that the Board did not in fact have a reasonable basis for its withholding action or that the Board's action was arbitrary or capricious.

It is further **CONCLUDED** that the notice of the Board's action was given to the petitioner within the ten-day limitation set forth in the statute; and in any event, the petitioner knew of the reasons for the withholding prior to the lapse of the ten-day requirement. He also knew of the deficiencies complained of well in advance of the Board's action, and he had time to correct those deficiencies. There has been at least substantial compliance with the statutory mandate.

ORDER

It is therefore **ORDERED** that the respondent's action withholding the petitioner's 1987-88 employment increment be **AFFIRMED** and the petition **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by **Saul Cooperman, Commissioner, Department of Education**, who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10

I hereby file this Initial Decision with **Saul Cooperman** for consideration.

July 27, 1988
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

7/29/88
DATE

DEPARTMENT OF EDUCATION

Aug 1, 1988
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

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PAUL GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner excepts to Findings of Fact Nos. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14. He summarizes his position by stating that contrary to the conclusion of the ALJ, he has carried his burden of proving the Board's action in withholding his increment was unreasonable, arbitrary, and made with improper motive. He claims he returned to employment after a RIF to an adversarial atmosphere, and only after the Commissioner ordered his reinstatement through another petition of appeal. He avers the first observation conducted by the principal, Mr. D'Alconzo, took place only 16 days after his return, on October 10, 1986. He further avows that over the next five months, until the principal's recommendation was made to the Board to withhold petitioner's increment, Mr. D'Alconzo criticized his performance continuously. "In short, Mr. D'Alconzo did examine Mr. Gordon under a magnifying glass, seizing upon every inperfection (sic), even though Mr. Gordon had not taught in Passaic Township for six years. As Mr. Gordon's supervisor, he should have sought to ease his transition back into Central School rather then (sic) attack his performance at every turn." (Exceptions, at p. 5)

Petitioner claims his performance was not inadequate, and that the principal failed to recognize his successful efforts to respond to criticism. He avows "the 'gulf of misunderstanding' between the parties" does exist (Exceptions, at p. 5) and, further, that "[h]is supervisors, and particularly Mr. D'Alconzo were substantially responsible for that gulf and Mr. Gordon should not be punished by the withholding of his increment." (Id.) Petitioner requests that the determination of the ALJ be reversed and that his increment for the 1987-88 school year be restored.

The Board's reply exceptions note that petitioner did not take exception to any of the proposed findings of law, nor are any exceptions taken to the manner in which the ALJ applied the facts found to the law. As to petitioner's exceptions to the factual findings of the ALJ, the Board submits that ample evidence exists to support the judge's factual conclusions and findings.

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The Board's reply exceptions counter, point for point, petitioner's exceptions on the ALJ's factual determinations. The Board avers that petitioner's exceptions solely aver that the ALJ's factual findings were wrong because Mr. Gordon offered testimony to the contrary.

> In point of fact, testimony which was almost diametrically opposed to Gordon's testimony on each such factual issue was offered by numerous Board witnesses and contained in voluminous documentation introduced by the Board.
> (Reply Exceptions, at p. 2)

The Board avows that the ALJ discharged his duty to evaluate the testimony of the witnesses and came to the conclusion, with regard to the particular factual findings in issue, that the testimony offered by the Board's witnesses was more credible than that offered by Gordon. Thus, the Board contends, "Judge Samuels' factual findings should not be second guessed by the Commissioner, but rather should be adopted by the Commissioner as his own." (Id.)

Upon his careful and independent review of the instant matter, which, it is noted, includes the transcripts of the hearing below, the Commissioner affirms the findings and conclusions of the Office of Administrative Law essentially for the reasons expressed in the initial decision. He adds the following.

In its April 6, 1987 letter the Board informed petitioner of the increment withholding action and furnished eight reasons for so withholding. The eight reasons upon which the Board relied in passing its resolution to withhold petitioner's increment include that respondent did not follow directives satisfactorily concerning:

1. Preparation of lesson plans
2. Starting classes on time
3. Delivering the prescribed Course of Study
4. Employing a variety of teaching approaches
5. Conferring with students and parents on individual progress
6. Adhering to schedules
7. Assuming specific assignments, i.e. bus duties
8. Improving class management techniques.

(Exhibit J-10)

In evaluating the testimony of the witnesses in determining whether the Board had a reasonable basis for withholding petitioner's increment, the ALJ found the following facts, by a preponderance of the credible evidence, which the Commissioner incorporates herein as an aid in evaluating the exceptions and reply exceptions:

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1. The eight joint stipulations of fact listed above are included herein.

2. Written curriculum guides for petitioner's classes were given to him in September 1986, at the beginning of the 1986-87 school year, and at least once again in the months thereafter.

3. Petitioner did not agree with the curriculum. He thought it was haphazard, impossible to teach and incomprehensible.

4. To a great extent petitioner did not follow the curriculum. His teaching, although containing meaningful elements, reflected his resistance to and disagreement with the curriculum.

5. Petitioner was spoken to by his supervisors and associates on many occasions about his departures from the curriculum, but he did not substantially correct the situation during the year in question.

6. The curriculum was not perfect. To some extent, it was repetitive and it sometimes contained difficult and inappropriate elements. However, it was capable of being followed and taught, and the same curriculum had been previously taught by others. Petitioner did not offer any concrete and organized suggestions for change or improvement when invited to do so.

7. The petitioner did not, on more than several occasions, submit his daily lesson plans to the principal, as required and requested.

8. Petitioner's daily lesson plan book was poorly kept (Exhibit P-1). The notes lacked sufficient comments and references to the curriculum to show how the lessons were being taught. It was often difficult to tell exactly what was being taught by looking at the entries in the book.

9. The petitioner had difficulty complying with procedures relating to the arranging and changing of students' schedules, and on some occasions this caused administrative problems.

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10. Petitioner was often unable to follow the procedures required for him to obtain sufficient materials and supplies.

11. The petitioner was sometimes unjustifiably late for class or for special duties, such as bus duty. Much of this was due to a lack of personal organization on his part.

12. The petitioner's teaching style and techniques sometimes failed to hold the students' interest and attention, resulting in difficult behavior or lack of involvement by some of the students.

13. The reprehensible Junior Achievement project took place after the recommendation and decision had been made to withhold petitioner's increment.

14. The Board voted on March 31, 1987 to withhold petitioner's increment, after he was given an opportunity to be heard. Written notice of the Board's action was sent to the petitioner six days later, in a letter by the president of the Board, dated April 6, 1987 (Exhibit J-10). The letter erroneously stated that the Board's action was taken on March 23. A subsequent letter was sent to the petitioner by the secretary of the Board on April 23, 1987 (Exhibit J-11) to correct the error.

(Initial Decision, ante)

Related to the curriculum, petitioner excepts to the ALJ's Findings of Fact Nos. 2, 4, 5 and 6. He avers as to these findings that he did not receive a curriculum guide until February or March of the school year in question; that he did not have adequate time to prepare the materials and lesson plans necessary to implement the curriculum because he was reinstated on September 24, 1986, after the school year had begun; that he followed the curriculum as best he could in that he "did not understand the broad concepts outlined in the curriculum and his principal was untrained in music (T I 6:21-25, 6:2-20) and was unable to explain the curriculum to Mr. Gordon" (Exceptions, at p. 2); that he is not obliged to follow the directives of his associates concerning the curriculum; and that only one associate spoke to him about his departures from the curriculum and only on two or three occasions.

The Board counters point for point relying on the testimony of its witnesses concerning Mr. Gordon's handling of the music curriculum. It cites the transcript in averring that Findings of Fact Nos. 2, 4, 5 and 6 are accurate. It summarizes its position

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concerning petitioner's alleged failure to conform to the curriculum guide by saying, inter alia:

> The inability of Gordon to understand, follow or teach the curriculum is a reflection of his teaching ability and would in and of itself furnish ample basis for the denial of his increment. His continued refusal to recognize that the problem in this area lies with him, rather than the curriculum, coupled with his refusal to accept constructive criticism from his co-workers and the administration merely compounds his problems. Judge Samuels' findings are amply supported by evidence in the record and should be adopted. (Reply Exceptions, at p. 3)

Related to Finding of Fact No. 7, submission of lesson plans, petitioner excepts to the ALJ's finding that he did not submit lesson plans "on more than several occasions." (Initial Decision, ante) He contends on those occasions when he did not submit lesson plans, his lesson plan book was always available in his room. He further excepts to the finding that his lesson plan book was poorly kept and lacked sufficient references to the curriculum. Again claiming he did not have a copy of the curriculum until February, petitioner avers he began to implement the curriculum as best he could, and was frequently changing the book after February in an attempt to respond to various criticisms from his superiors.

In reply to petitioner's lesson plan exceptions, the Board counters that ample evidence exists that petitioner only submitted his lesson plans, which were required to be submitted on a weekly basis, sporadically. It cites excerpts from the transcript of the testimony of the principal and superintendent suggesting that he failed to submit lesson plans at least twelve times, which petitioner denied in his exceptions. The Board contends that "the fact that his supervisor possibly could have gained access to the plan book if he searched through Gordon's room or rooted around his desk does not excuse Gordon's failure to follow D'Alconzo's directive." (Reply Exceptions, at p. 4)

As to the manner in which Mr. Gordon kept his lesson plan book, the Board rebuts petitioner's position stating, inter alia, that Mr. Gordon was advised of deficiencies in how the plan book was kept but that he did not take any appropriate corrective action.

Concerning scheduling changes, petitioner excepts to the ALJ's finding that he had difficulty complying with scheduling. He avers that although there were some initial problems, he corrected them after October 1986. He stated that the principal admitted that scheduling problems improved after that date, and cites Tr. I 44:6-21 in support of this proposition.

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The Board counters stating that the principal testified that Mr. Gordon did not correct his scheduling problems after October 1986, and cites Tr. I 44:13-25 in support of its position. Further, the Board claims, petitioner's scheduling problems were not limited to class schedules, but extended into areas such as scheduling band practices, field trips, and extracurricular activities.

Petitioner excepts to the ALJ's finding that he often did not comply with procedures for obtaining materials and supplies. He avers there was no testimony of a procedure for obtaining course material. With regard to requests for audiovisual equipment, Mr. Gordon testified that he did follow the correct procedures but was not given the materials so he resorted to sending his students for them. He cites Tr. II 131:8-20 in this regard.

The Board claims in reply that there exists ample support in the record that despite there being a procedure in place for obtaining audiovisual equipment which petitioner was made aware of in October 1986, he repeatedly failed to follow that procedure, even after being advised of the procedure in writing.

The Board also claims that petitioner was advised that if he needed materials and supplies, he was to prepare a list and submit it to the principal, but that he never did so before April 1987, which was after the Board voted to withhold his increment. The Board cites Tr. III 33:19-35:4 in support of this position.

As to the finding concerning his timeliness to class, petitioner excepts to the extent this finding omits his testimony that his promptness improved after a change in room assignment that allowed him to travel from one area to the next in timely fashion. The Board counters this exception by stating that petitioner's exception "acknowledges that there was a problem with promptness prior to the change, thereby lending support to Judge Samuels' finding. Further, even accepting Gordon at his word, the exception cites no testimony that the problems of being 'unjustifiably' late for classes or assignments <u>ceased</u> at any point in time." (emphasis in text) (Reply Exceptions, at pp. 4-5)

Concerning the Junior Achievement incident and the ALJ's finding of fact relative to it, petitioner excepts to the extent it attributes student misbehavior to his teaching style. He contends the Junior Achievement incident clearly shows the pervasive atmosphere of disrespect for him, "encouraged or at least tolerated by the administration of the Central School." (Exceptions, at p. 4)

The Board rebuts by suggesting:

> Perhaps one of Gordon's main faults is demonstrated in this exception.*** Gordon insists that no fault lies with him and that it rests solely with the students and administration, as demonstrated by his exception to this

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> finding. The first step in improving performance is recognizing a problem. Gordon refuses to do this. The Board has an obligation to respond accordingly. Judge Samuels' finding that Gordon's style and technique failed to hold student interest and attention thereby leading to lack of involvement or difficult behavior is supported by the record and should serve as a signal to Gordon to heed the suggestions of those attempting to help him improve.
> (Reply Exceptions, at p. 5)

Petitioner's exception to Finding of Fact No. 14 pertains to notice of the Board's action, sent to petitioner twice, once on April 6, 1987 (Exhibit J-10) and again on April 23, 1987 (Exhibit J-11). Petitioner contends there is no evidence to indicate that the April 23 letter was sent "to correct the error" in the first letter. (Exceptions at p. 4, quoting the Initial Decision, ante) Petitioner avers that the assistant superintendent did not know, nor did counsel for the Board know, why two letters were sent.

The Board rebuts that petitioner's exception is irrelevant, in that petitioner does not except to the fact that the Board acted on March 31, 1987 after giving Mr. Gordon an opportunity to be heard and notified him in writing within the statutory ten-day period.

The Commissioner notes initially that the question of whether the Board's action to withhold in this matter was intended to include both petitioner's adjustment increment and his employment increment was resolved before the ALJ in post-hearing correspondence from Board counsel who indicated in his letter of June 20, 1988 that the only increment the Board intended to withhold from petitioner for the 1987-88 school year was his employment increment. Thus, any argument advanced by petitioner in this regard is rendered moot.

Further, the Commissioner adopts the finding of the ALJ that the Board voted to withhold petitioner's increment on March 31, 1987 not March 23, 1987 as was stated in the Board's first notification to petitioner, dated April 6, 1987, "well within the ten-day limitation set forth in the statute." (Initial Decision, ante) The Commissioner so finds.

As noted by the ALJ the factors to be weighed by the Commissioner in evaluating a decision by a board of education to withhold a teacher's increment are established in Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (App. Div. 1960) wherein the Appellate Division stated:

> [T]he scope of the Commissioner's review is, as respondents say, not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for

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> their conclusions.***[T]he burden of proving unreasonableness is upon the appellant.
> (at 296-297)

The Commissioner also concurs with the ALJ's statement that:

> [I]t has been held by the Commissioner that "justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents." [Myers] v. Glassboro Board of Education, 1966 S.L.D. 66, 68. See also, Rosania v. Board of Education of the Borough of Middlesex, Middlesex County, OAL DKT. NO. EDU 5723-87 [OAL DKT. NO. EDU 5303-86, remanded August 20, 1987] mod., Commissioner of Education, January 22, 1988.
> (Initial Decision, ante)

The Commissioner notes that petitioner concedes that he did not follow the curriculum in music, averring that "[h]e did not understand the broad concepts outlined in the curriculum" (Exceptions at p. 2); that "part of the curriculum is impossible to teach" (Tr. I - 108); that "there were things unimplementable in the study guide." (Tr. II - 38) The Commissioner agrees with the Board's statement made in reply exceptions pertaining to petitioner's failure to implement the curriculum that had been in effect, and successfully taught by others for years. (Tr. III - 77) Therein the Board contends: "The inability of Gordon to understand, follow or teach the curriculum is a reflection of his teaching ability and would in and of itself furnish ample basis for the denial of his increment." (Reply Exceptions, at p. 3)

The Commissioner finds, additionally, that petitioner's admitted repeated tardiness to class (Tr. I - 102) and his admitted failure to consistently submit his plan book (Tr. II - 67; Tr. I - 101) despite admonitions to do so, certainly indicate deficiencies establishing that the Board's action was not arbitrary. Were it not for the evidence presented in the record, as acknowledged by the ALJ, suggesting that there might be a "gulf of misunderstanding" between those individuals involved in this matter, the Commissioner might consider the ample evidence of petitioner's professional shortcomings as indication of intractability. However, the Commissioner's review of the record does comport with the ALJ that other factors require temperance in evaluating petitioner's situation. See Initial Decision, ante.

Petitioner's exceptions, which are essentially a rehash of the testimony proffered at hearing, however, offer no new or convincing arguments to persuade the Commissioner that the Board's withholding, notwithstanding the apparent personality differences, was without a reasonable basis. Because it is not for the Commissioner to substitute his judgment for that of the Board in

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deciding the withholding matter and for the reasons expressed in the initial decision, the Commissioner finds and determines that petitioner has failed to prove, by a preponderance of the credible evidence, that the Board did not in fact have a reasonable basis for withholding his employment increment for the 1987-88 school year.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

September 7, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6014-87

AGENCY DKT. NO. 259-8/87

STEPHEN DUNBAR,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN,

Respondent.

Mary Jane Cullen, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

Edgar E. Moss, II, Esq., for respondent (Moss, Powers, Kugler & Lozenby, attorneys)

William Wallen, Esq., for respondent Cheryl Haines (Selikoff & Cohen, attorneys)

Record Closed: June 24, 1988 Decided: August 3, 1988

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Stephen Dunbar, petitioner, alleges and the Moorestown Board of Education, respondent, denies that the Board abolished Dunbar's media specialist position and reassigned a person with lesser seniority than Dunbar to a secondary media specialist position. Dunbar alleges this is in derrogation of his tenure and seniority rights.

The issue to be resolved in this matter is whether the reassignment of the petitioner has been effected properly and, if not, to what relief he is entitled.

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PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education by Stephen Dunbar and answered by the Moorestown Board of Education. The matter was transmitted to the Office of Administrative Law for disposition as a contested case on September 2, 1987, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After notice, a prehearing conference was held on November 17, 1987. The above-stated issue was agreed upon as were several other procedures.

Subsequently, Cheryl Haines, also an employee of the Moorestown Board of Education, moved to be admitted in the matter as an intervenor. On May 20, 1988, I issued an order granting intervention. The matter was heard on May 23, 1988, in the Mount Laurel Municipal Court.

RELEVANT EVIDENCE

The parties stipulate that the petitioner was hired for the 1978-79 school year as a media specialist in a 12-month position assigned to the high school. In 1979-80, the contract term was reduced to 10 months, but his assignment remained the same. In 1986-87, Dunbar applied for and the Board approved a leave of absence. Upon his return, he was assigned as a media specialist in the South Valley School (R-1).

The petitioner adduced considerable testimony concerning the duties of the media specialist assigned to the high school and the media specialist assigned to the elementary school (P-6, P-7, P-8). It was stipulated that the petitioner properly was assigned and performed the duties of media specialist at the high school. He also served as stage manager under a separate contract.

DISCUSSION AND DETERMINATION

The petitioner makes three points: (1) that he has tenure as a media specialist, (2) that the Board violated his tenure rights as a media specialist by transferring him to the elementary position, and (3) that as a consequence of the improper reassignment to

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the elementary school he lost the assignment as stage manager in further violation of his tenure rights.

Addressing the last point, it is black letter law that no extracurricular assignment is as of right. See, e.g. Barber v. Kearny Bd. of Ed., 1977 S.L.D. 125. The petitioner has not presented sufficient evidence here to show that the stage manager position, with its separate contract and stipend, has somehow become engrafted upon the position of high school media specialist. In fact, from the description of the job, it appears to be primarily clerical and not a position that would require any particular expertise in the media specialties.

The petitioner's first point is granted. He has tenure as media specialist. However, this in no way takes from the Board the right to transfer the petitioner to any position within the scope of his certification and which does not result in a reduction of salary or a diminution of rank. Williams v. Plainfield City Board of Education, 176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 306 (1981). Even if the high school media specialist job cannot be performed by a person holding an associate educational media specialist certificate, that does not confer on the petitioner a claim to the position as of right. Payne v. Board of Education of Ridgewood, 1976 S.L.D. 605.

From the copious testimony concerning the duties performed by the media specialists at the secondary and elementary levels in Moorestown and the duties they are authorized to perform by Administrative Code, I agree with the petitioner that the difference in duties between the two positions is that the holder of the educational media specialist certificate may develop and coordinate educational media services while the holder of an associate educational media specialist certificate may only perform those services. But the testimony also shows that the high school media specialist does not develop or coordinate educational media services. Rather, the specialist at the high school performs educational media services. Under the Administrative Code, this is precisely what an associate educational media specialist may do.

As the intervenor correctly notes, N.J.A.C. 6:11-12.23 requires an associate educational media specialist to be under the supervision of "a qualified supervisor." There is no requirement that the supervisor be an educational media specialist. In the present

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case, the high school media specialist is supervised by the building principal. I think a building principal is a qualified supervisor.

In addition to the facts stipulated above, I **FIND:**

1. The petitioner is certified as an educational media specialist.

2. For many years, the petitioner was assigned to the district's high school.

3. In 1986, the petitioner was on an approved leave of absence and the intervenor was assigned as a media specialist at the high school.

4. Upon return from his leave, the petitioner was assigned as media specialist in an elementary school.

5. The intervenor continued in the high school assignment.

6. There has been no reduction in force of media specialists in the district at any time pertinent to this dispute.

7. The petitioner was transferred within the scope of his certification.

8. The petitioner has suffered no reduction of salary or diminution of rank.

9. The petitioner had no right to the stage manager position.

Inasmuch as a board of education has the authority to transfer individuals within the scope of their certifications, N.J.S.A. 18A:25-1, and inasmuch as proper transfers are neither arbitrable nor negotiable, Williams, above, I **CONCLUDE** that the petitioner has failed to carry the burden of proof in this matter. He is a tenured media specialist. He serves in a media specialist position. He has not suffered a reduction in salary.

I **CONCLUDE** that the transfer of petitioner having been a valid exercise of the Board's legislatively invested authority, the present petition must fail.

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It is **ORDERED** that the petition be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3 AUGUST 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

8/5/88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 8 1988
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

ds

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STEPHEN DUNBAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner posits two exceptions, based on two conclusions reached by the ALJ. "The two (2) conclusions are that a) the 'qualified supervisor' provision of N.J.A.C. 6:11-12.22 does not dictate that the person be an educational media specialist, and that a building principal can satisfy the provision; and b) the specialist at the high school only performs educational media services and does not develop and/or coordinate them." (Exceptions at p. 1, citing the Initial Decision without specific reference) Petitioner claims the first conclusion is legally erroneous and that the latter conclusion is factually erroneous.

As to the first conclusion, petitioner submits that N.J.A.C. 6:11-12.22 requires an associate media specialist such as the intervenor to be under the supervision of a media specialist, who is the qualified supervisor dictated by the regulation. He avers that "[t]he regulation pertaining to Associate Media Specialist, however, makes special provision for a 'qualified' supervisor, thereby implying that something more is needed, and in a logical sense, someone who can supervise the performance of specialized media skills." (Id., at pp. 1-2) Petitioner claims this is a role only the media specialist can fill.

Further, indicating that the person occupying the media specialist position at the high school is supervised only by the building principal, petitioner avows that the intervenor cannot properly occupy said position because she is not being supervised in the area of educational media services by someone qualified.

> Although this alone, as an isolated factor, does not entitle Petitioner to the high school position, it lends to the argument below that the relevant specialist position at the high school is that of a media specialist and to be distinguished from that of the elementary position

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> which is that of an associate media specialist, and that Petitioner's transfer to the latter position violated his tenure rights.(Id., at p. 2)

Concerning the ALJ's conclusion that the intervenor, the current media specialist at the high school, does not develop and/or coordinate media services but only performs them, petitioner submits that the job description proposal (P-6) of the high school media specialist position requires a media specialist endorsement. Quoted language from that description follows:

> ***The media specialist develops programs to stimulate interest in the use of print *** materials***. Plans *** programs of instruction***. (emphasis supplied)

The performance responsibilities of the job description lend further support. Relevant provisions are:

> 1. Evaluates *** media materials***.
>
> 2. Prepares and administers budget for media center.
>
> ***
>
> 9. Works cooperatively with regional, county and local media resources.
>
> 10. Organizes and supervises the circulation of media materials.
>
> 11. Participates in curriculum study and revision.
>
> ***

Thus, petitioner contends the media specialists at the high school do more than perform media services; they develop and coordinate programs, budgets and curriculum. He further avers that the person occupying such position must hold an educational services certificate with a media specialist endorsement. He claims that he acquired tenure in the position of media specialist and then was transferred to the elementary position, "which given the circumstances of this case, was that of an associate media specialist, and a seperately (sic) tenurable position of lesser rank (because the holder can only perform media services)***." (Exceptions, at p. 3) Thus, petitioner avows, his tenure rights were violated.

The Board's reply exceptions aver that petitioner's exceptions obscure the fundamental facts in this case. It states as follows:

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1. Petitioner was assigned to duty within his area of certification performing a service with responsibilities within that area;

2. It is unrefuted that the task (sic) performed by both media specialists in the high school media center, one of whom was a specialist and the other an associate, are identical and are supervised by the assistant principal. (Reply Exceptions, at p. 1)

For the reasons that follow, the Commissioner adopts the recommended initial decision.

Having carefully and independently reviewed the instant matter, the Commissioner notes initially that the record before him does not include transcripts of the hearing below. Thus, in determining whether the duties performed by the media specialist at the high school are substantially the same as those performed by the media specialist at the elementary school in question, the Commissioner will rely on the credibility determinations and the findings of fact of the ALJ who determined that "the high school media specialist does not develop or coordinate educational media services. Rather, the specialist at the high school performs educational media services." (Initial Decision, ante) In so adopting this finding, the Commissioner notes the lack in the record of any indi- cation of what certification is required by the Board of Education to hold either position, although it is conceded that petitioner is tenured as a media specialist, so he apparently holds whatever certificate is required by the Board. Spiewak v. Rutherford Board of Education, 90 N.J. 63, 72 (1982) He so finds notwithstanding the submission into the record of Exhibits P-6 (Job Description Pro- posal, Media Specialist, May 1987) and P-7 (Job Description, Media Specialist, undated). P-6 does not establish that said proposed job description was ever adopted by the Board. Moreover, it states as qualification for the position merely, "As determined by New Jersey state certification requirements and the Moorestown Township Board of Education." (P-6, at p. 1) P-7 provides no certification qualifications whatsoever. Thus, the record before him does not establish clearly exactly what endorsement the positions in question require.

With the knowledge that there has been no RIF in the instant circumstances, the matter thus becomes one of comparing the duties performed by the media specialists at the secondary and elementary levels in Moorestown. Granting attentive consideration to the ALJ's findings pertaining to the actual duties performed in each of the two positions in question, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law for the reasons expressed in the initial decision that petitioner has failed to carry the burden of proving that such high school duties cannot be performed by an associate media specialist.

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The Commissioner is in accord with the ALJ's determination as well, that a principal is an appropriate supervisor of the media specialist in Moorestown. Moreover, he adopts as his own the conclusions and findings of the ALJ rejecting petitioner's claim to continued employment in the extracurricular assignment of stage manager, for the reasons expressed in the initial decision.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

September 13, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1224-88

AGENCY DKT. NO. 30-2/88

E. T., SR., ON BEHALF OF HIS SON, E.T., JR.,

Petitioner,

v.

BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Roland G. Hardy, Jr., Esq., for petitioner

William D. Hogan, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

Record Closed: June 28, 1988 Decided: August 2, 1988

BEFORE **NAOMI DOWER-LABASTILLE**, ALJ:

E.T. seeks reversal of a ten-day disciplinary suspension imposed by the Board of Education of the Sterling High School District (Board) on grounds that it was unreasonable because E.T.'s actions were taken in self-defense in a racially-charged atmosphere. On February 26, 1988, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held on April 5, 1988 and hearings took place on June 7 and 14, 1988 at Lawnside. The record was held open until June 28, 1988 to receive written summations. A list of exhibits entered into evidence is appended to this decision. In accordance with the prehearing order, the Board produced testimony first to show the basis for its action. Petitioner had the burden of proof to show that the Board's action was unreasonable. In testimony E.T. presented, he attempted to controvert facts offered by the Board, present his defense of self-defense and reveal racially-based conduct which, he alleged, played a part in the incidents. It is undisputed that on October 29, 1987, in the high school building, after a track meet, E.T., a black student, was assaulted by D.S., a white student, and shortly thereafter E.T. approached D.S. and other track team members with a knife in his hand. D.S. received a three-day internal suspension for fighting. E.T. received a ten-day external suspension, which was subsequently modified to a three-day external suspension (already served) and a five-day internal suspension.

THE TESTIMONY

The Board presented George Dinich, its superintendent, to describe the process by which the Board arrived at the disciplinary determination, including the investigations and internal appeals which preceded it. He pointed to the Board's policy, adopted and published in the student handbook (R-26, page 34), which lists physical assault upon another pupil as good cause for suspension (Section XI) and carrying dangerous objects (weapons) under Section XII as an infraction which would result in "severe administrative penalties" and a minimum suspension of ten days. Dinich was unaware, prior to October 29, 1987, of any racial statements or incidents which allegedly occurred, but stated that under the usual procedures the cross-country (cc) coach would have brought such incidents to the attention of the athletic director, not the superintendent.

After learning of the allegations of racial slurs, Dinich personally addressed the whole cc team and one particular student, J.B., who had been implicated. Dinich questioned Coach Hopkins and learned that E.T. had complained to the coach of notes with racial slurs being placed on or in his locker (although he never produced one) but Hopkins was out sick for two weeks immediately after the conversation with E.T. and forgot about it until the October 29 incident. Dinich felt that E.T.'s statements concerning racial slurs were not otherwise substantiated, that he had an opportunity after the fight was broken up to leave the building but instead chose to re-engage, and that picking up a knife was a far more serious infraction than starting a fight alone. In addition to speaking to E.T., Dinich questioned D.S. and three other team members, J.W.,

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B.A. and T.D., all of whose stories in his view, were generally consistent and did not support E.T.'s version of all the events before and after the fight. T.D. and J.W. stated that racial statements were made by both sides. In Dinich's judgment, any statements made were joking, jesting, playful and not threatening.

E.T. testified that he will be in eleventh grade in the 1988-89 school year. In the fall of 1987, there were eleven boys on the cross country team. He was the only black. He had been on the cc team in 1986-87 also with the same coach, but could not recall any racial problems that year. He stated that the racial slurs and jokes started in September 1987. He was called "nigger," "spearchucker" and "black man," mostly by C.W., on an everyday basis. Others, like B.B., G.D., T.D. and J.B., made black jokes. He asked them to stop. J.W., the captain, asked a couple of team members to stop. E.T. began to come to practice later to avoid the name calling. On at least three occasions, he found the following comments on brown tape stuck on his locker: the first said, "get out nigger," the second said, "better quit or we'll get you," the third said, "no blacks." He found the last note about two or three weeks before October 29. He tore them up and threw them away, but he did tell Coach Hopkins about it just before Hopkins got sick. He also told Hopkins he was thinking about quitting the team. Hopkins told him to discuss the problem with his father.[1]

E.T. felt "very low" and unwanted as a result of these incidents. He felt that the others did not want him or any blacks on the team and he discussed his problem and his desire to quit with another team member, B.A., whose subsequent testimony corroborated that of E.T. E.T. stated that the black jokes had been made in the locker room and also after Hopkins had left practice when the team members would go over to the field and play football. On one occasion on a Saturday morning in September, E.T., T.D., D.D. and J.A. went to get a pizza for lunch, went back to school to get clothes and played football. The boys were squirting sodas on each other and T.D. got mad at E.T. and J.A. T.D. was afraid of J.A. T.D. called E.T. a nigger and the group got into a fight.

---

[1] E.T., Sr., is a physical education teacher in Camden and had been Hopkins' coach and teacher.

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On October 29, 1987, the whole team came back from a meet. Since they would tell black jokes on the bus, E.T. moved to the back where T.D. was sitting. E.T. asked T.D. to tell the others to stop. D.S. contributed to one of the jokes. E.T. asked him why he did this. D.S. got up and moved to the front of the bus. When the bus got back to the school, E.T. went to the locker room and changed. While waiting for his friend B.A. he saw D.S., who told E.T. not to fight because they were just joking around. E.T. and B.A. went through the breezeway to the telephone area. B.A. walked a girl to her car and did not come back for a while. E.T. tried the doors and had to go through the school band room to get his bike because the bike gate was closed.

E.T. continued by recounting that near the corner of the band room where the wrestling mats were kept, D.S. charged him, causing him to go down on his knees. D.S. hit him, lifted him up and slammed him down. E.T. stated that T.D. yelled, "body slam, beat him up." Others arrived. D.S. threw two punches. He was on top of E.T., who pushed him off. J.W. ran between them, grabbed D.S. and pushed him against the wall. T.D. grabbed E.T. near the neck. J.W. said, "stay away from each other." Except for the yelling (of T.D.) and the presence of band members, thus far E.T.'s version of the fight is more or less the same as that of the other boys who testified later.

E.T. testified that T.D. then chased him as he ran out the corridor and across the lawn. He could not remember which door he ran through. He saw another team member in a car. He did not know where the others were. He believed they went out another door. E.T. ran back through the main entrance and through the gym, thinking he would be safer inside the building. He ran all the way back through the gym and out into the breezeway in back. He believed T.D. was still chasing him. He ran down the breezeway toward the area from which he had originally come and saw that the door to the janitor's office was open. There was a large knife on a shelf; he grabbed it and kept running. Suddenly he saw the team members in front of him at the corridor by the telephones. E.T. had almost come full circle. He walked toward them with his arm down and the knife pointed down by his side. He asked D.S. why he "jumped" him. J.W. came up to E.T. and said "put the knife back." D.S. was yelling. J.W. came between E.T. and D.S. D.S. answered E.T.: "they told me you would jump me first." E.T. went back to the janitor's office, put the knife back and went out the janitor's door. E.T. did not see "them" so he went toward the curb, where he saw D.S. leaving with his mother. D.S. rolled down the window (his mother said, "don't"), and E.T. again asked D.S. why he jumped him. D.S. told E.T. a little kid (not one of the team) warned him that E.T. was coming to fight him. D.S. said he was sorry. D.S. and E.T. were and still are friends.

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All of the above is related at length from E.T.'s testimony because E.T.'s perceptions and state of mind are significant to his defense. It should be noted that E.T. could not remember by which door he left after the fight and believed T.D. (one of the oldest and biggest boys on the team) was chasing him. It seems apparent to me that the racial slurs and jokes, even if not pervasive, and the slurs, both real and imagined, had brought E.T. to an explosive pitch. He felt he had to fight the next person (even his friend D.S.) who made a racial remark. But he had to screw up his courage to do this. Suddenly, his worst fears were realized. He was attacked by D.S. and getting the worst of it. He was the only black and he was down. Now the whites were going to get him. One of the seniors was after him, chasing him. Now they would all get him. This is my interpretation of E.T.'s state of mind. He was so beside himself that neither his mind nor his senses were working properly. The fact that E.T. could not remember how he got out of the building is a key to his emotional state.

If this interpretation is correct, it is understandable that E.T. believed "they" were coming outside after him. He ran back in to "safety." He was not thinking in terms of getting his bike and getting away. He was not thinking at all. He was mindlessly running, he mindlessly grabbed the knife he saw and he mindlessly ran on. Suddenly, he realized "they" were in front of him. He wasn't going to turn and run back. Eventually, he raised the knife in frustration, as if to say, "stay away from me." I do not believe he had any thought to use it. His actions throughout the incident from the time the fight began were purely instinctive.

Dinich's stated rationale for the suspension imposed on E.T. included his judgment, based on investigations, that E.T. could have disengaged from the dispute and instead chose to continue it. He did not believe parts of E.T.'s statements because they were not in accord with statements of the other boys who were interviewed. For example, other witnesses told him no one was chasing E.T. after the fight, and reported little or no corroboration of any racially-based taunts or jokes. Most reported a more menacing stance on the part of E.T. when he appeared with the knife, and Dinich's knowledge of past practice at the school led him to believe that the gate to the area where bikes were parked must have been open at the time of the occurrence. As to the last fact, E.T. must be believed because no other witnesses were able to testify from personal knowledge whether the gate to the location of E.T.'s bike happened to be open or closed at the time of the incident. I also have no reason not to believe E.T.'s testimony concerning racially-based notes, name-calling and jokes. Other witnesses did corroborate

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a few instances and it was clear why others could not: the older boys, captain and coach sat in the front of the bus and could not hear comments in the back, or they took place after practice or in the locker room. It was also clear that Dinich honestly believed his school to be free of racial incidents and tensions and had made efforts to that end. It was difficult for him to accept evidence contrary to that view.

D.S., the young man who had always been friendly with E.T. but who succumbed to the rising tensions, over-reacted, and "jumped" E.T. on October 29, could not recall any racial jokes or incidents between September and October 29, 1987. He observed that C.W. had some hostility toward E.T. but did not know why. D.S. testified that, coming back from the meet on October 29, the team members' attention was attracted to a "very funky looking white girl" standing outside the bus. (I interpreted him to mean she was dressed and coiffed in punk-rock fashion.) As they looked on, D.S. said to E.T., "that's a white man's girl." D.S. was "joking" (in his view) and meant no harm. E.T. took offense and moved away; then on the way home E.T. said, "we're going to go at it after we change in the locker room." D.S. interpreted this to mean E.T. was going to fight him. When D.S. said he would fight, E.T. said "yes, because you're a prejudiced asshole." Later, E.T. asked if he was ready. D.S. said no. S.B. came up to D.S. in the pay phone area and said, "that black man outside is going to jump you when you leave." As D.S. walked toward the band room, E.T. came around the corner at a quick pace where D.S. did not expect to see him. D.S. grabbed him and threw him against the wall, started wrestling and threw a couple of punches before J.W. and T.D. broke it up.

J.W. is a senior, age 18, the team captain and the most mature and poised of the students who testified. J.W. never recalled hearing name calling or ethnic slurs. He did recall ethnic jokes concerning Italians, and stated that he was part Italian. He customarily rides in the front of the bus with coach Hopkins. He was not aware of any notes being placed on E.T.'s locker. He never observed hostility between E.T. and D.S. When they got back to the school after the cross country meet on October 29, he was getting his books from a locker in the hall when E.T. said, "tell D. I'm looking for him." He saw D.S. run after E.T. near the band room. He, T.D., B.A., a "little kid" (S.B.) and some band members saw the fight. D.S. was getting the best of E.T. J.W. was too busy trying to break up the fight to hear what was said. T.D. grabbed E.T. and J.W. got between them, grabbed D.S. and threw him against the wall. J.W. told D.S. to stay and E.T. to go. J.W. said T.D. was with him and no one followed E.T. when he left.

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J.W. stated that E.T. went down the hall toward the breezeway (in back of the building where the custodian's room was located) and that due to the crowd and the fact he was involved with telling D.S. to cool off, he did not recall seeing which way T.D. went. He also did not see which way E.T. went after his initial start toward the wrestling mat area (not far from the band room). He next saw E.T. "stomping" back down the hall with a knife in his hand, blade upward, held at waist level. E.T. appeared to be threatening D.S., and J.W. was scared. E.T. made a statement to the effect, "if I don't get you now, my boys will get you tomorrow at lunch." T.D. jumped in the middle. D.S. ran away from the scene. E.T. went back down the hall and T.D. called the police.

J.W. was asked why his brother, C.W., was "kicked off" the team. (There was testimony that C.W. made racial slurs to E.T.) J.W. said the coach didn't like his brother and that it was not his brother who had made a racial comment at the Woodbury meet but another boy named D.D. J.W. admitted he had discussed the events with T.D. and B.A. when they were subpoenaed.

T.D., a senior, is tall and looks strong. He testified he never heard any racial slurs, name calling or jokes addressed to E.T. or called out of the windows of the bus. He was aware of use of the term "dago," which he regarded as a joke between J.W. and the rest of the team. He had heard about the notes on E.T.'s locker before October 29, but does not recall if E.T. told T.D. he might quit the team or if he said he had been called names. T.D. told E.T. it was not worth quitting halfway through the season. On October 29 he heard D.S. have a couple of words with E.T. E.T. said he was going to fight D.S., but T.D. did not take it seriously. The bus was noisy and he did not hear much. T.D. did not recall any band members being around during the fight. E.T. was getting the worst of it. T.D. grabbed E.T. with a full nelson under the arms to pry the boys apart. J.W. held D.S., but he broke away. T.D. had to put both E.T. and D.S. against the wall. D.S. was going after E.T. E.T. took off down the hall in the direction of the janitor's room. No one was chasing him. T.D. testified that when he was standing in the hall by the cafeteria corner he saw E.T. turn right into the breezeway at the back and then come back and go into the janitor's room.

D.S. went to call his mother for a ride. The others stayed near the telephones. E.T. came back toward the telephone area and seemed calm, but walked toward them with a knife. He held it straight down and behind his back. At arm's length from T.D., E.T. put his arm up with the blade pointed toward T.D., who was in front of the other boys. J.W. said, "calm down." T.D. grabbed E.T. by the neck and collar to hold

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him off. E.T. tried to get around. T.D. said, "we all moved in a circle till D. could run out the door." T.D. was scared. He let go when D.S. ran away. E.T. went back down the same hallway. A minute later, T.D. saw him cut through the gym toward the main entrance. T.D. was afraid E.T. still had the knife so he chased E.T. down the corridor and out the main door but gave up when E.T. continued running around the front of the building and back toward the parking lot. T.D. went back and called the police. T.D. was not aware of anyone chasing E.T. after the initial fight.

B.A. is 16 years old and in tenth grade. He had observed a few incidences of racial slurs, jokes and name calling while engaged in team activity. He considered them just jokes. He heard the term "nigger" used on the bus. He said that E.T. might have been able to hear it but it was not addressed to him. E.T. told B.A. about the notes on his locker about two weeks before October 29, but nobody would admit doing it. E.T. said it was stuff written about "niggers" and that he ripped them off and threw them away. B.A. told E.T., "don't worry about it." E.T. also told B.A. about one or two racial remarks prior to the locker notes and said he might quit the team because he felt he was not welcome, as the only colored person, and he felt tension due to this. B.A. believed E.T. and D.S. were friends, but a few times they pushed each other around.

On October 29, B.A. noticed E.T. talking to D.S. back in the locker room. Then E.T. said to B.A., "are you going to watch the fight?" B.A. asked "what fight?" and E.T. said, "me and D." "Why?" asked B.A., but E.T. disappeared out the door. Soon after, B.A. saw E.T. standing near the telephones. A little kid came out and called E.T. a wimp because he would not fight. B.A. guessed someone sent the kid to do this. B.A. started to walk away, then he heard loud voices and ran back to the hallway. He saw the fight. E.T., D.S., J.W. and T.D. were involved. Band members were down the hall but not right at the scene. B.A. heard the little kid say to D.S., "body slam E." T.D. and J.W. were trying to break it up: J.W. had D.S. and T.D. held E.T. They were kicking to get back at each other. T.D. had D.S. in a hold and let him go to the telephones to call for a ride. No one chased E.T. at this time. B.A. thought E.T. went out through the band room door. He did not go toward the phones where D.S. went.

B.A. was standing in the hall which ran from the band room (front) to the breezeway (back) at or near its junction with the hall where the telephones were located. He was not a participant in the melee. After the fight, J.W. and D.S. came toward B.A. T.D. was in back of them (toward the band room) with E.T. T.D. followed E.T. into the

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band room to watch him leave by that door. B.A. knew this because when T.D. and E.T. disappeared from the hallway through the band room door, B.A. proceeded down the telephone corridor to the side door and looked toward the front of the building. He saw E.T. come out with T.D. behind him. Then T.D. went back in the way he came out. E.T. appeared to be leaving so B.A. went back in through the side door toward the telephones and the intersection of that corridor with the front-to-back hallway. In a few seconds, he saw E.T. cross the corridor and go back through the gym toward the breezeway, which meant that E.T. had gone around the front of the building and back in through the front door.

B.A. testified that he was near D.S.'s locker and T.D. was nearby. D.S. had gone out, but had then come back in to the telephones. B.A. and T.D. were standing near D.S.'s locker. B.A. told D.S. that E.T. had come back in. A few minutes later E.T. came "stomping" down the hall with a knife held down at his side. Someone said, "calm down." No one mentioned the knife. When E.T. got to the corridor intersection, he brought his hand up and pointed the knife. He said to D.S., "I'm going to get you either now or tomorrow at lunch." T.D. grabbed his neck and D.S. ran out. Then E.T. ran back down the hall the way he had come.

It is necessary to recount the testimony of each eyewitness because E.T. argues that, as a lone black who had been subject to racial taunts, his conduct was justified by self-defense and he picked up the knife only after being suddenly assaulted by a white boy and chased by one or more who had been egged on by a group of onlookers hostile to E.T. The school administration did not accept E.T.'s explanation because the eyewitnesses (J.W., T.D. and D.S.) said no one was chasing E.T., because they did not believe there had been any form of racial harassment prior to the incident and because they did not believe the gate to E.T.'s bike was locked (since it usually was not). They therefore concluded that E.T.'s appearance with a knife was a deliberate re-engagement to get even, when E.T. had had a clear option of leaving the scene.

The testimony proved that there was insensitivity and racial harassment to some degree. Since E.T. spoke to the coach, Paul Hopkins (who testified on that point), and to B.A. concerning the notes on his locker and his feelings that blacks were not wanted and that he should perhaps quit the team prior to October 29, he was obviously not fabricating this information after the fact. D.S. did not tell the school authorities his remark about the "white man's girl" prior to the disciplinary determination, which was the immediate action that incited the fight. Bits and pieces of E.T.'s testimony were corroborated.

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B.A. was the most reliable witness on several points because he was the only one who was not in the thick of the physical imbroglio, as the older boys (J.W. and T.D.) were. The fight took seconds; the whole incident was over in minutes. There was evidence that E.T. could have perceived he was being chased. D.S. tried to get at him after the fight. T.D. "followed" him out the band room door. E.T. was so overwrought that he could not recall what door he used. Some of the boys in the group were or appeared to be going outside. At one point, after the fight, D.S. ran outside through the side door and then came back to the telephone area.

There is another logical inference in E.T.'s favor. When he ran back into the school where he believed he would be safer, he had no knowledge that there was a knife in the custodian's office. Seeing students down the hall and being afraid, E.T. would have run into the custodian's room without thinking. He picked up the knife to give himself coverage. He "stomped" down the hall like an automaton for the same reason. He was suffering from fear, from guilt over fear and from frustration at having gotten the worst of it in the fight. I do not find he had at any time an intention to find a weapon for the purpose of injuring anyone. Since the whole group of boys was present, it would have been illogical for him to attempt any kind of attack. Finding himself in the center of the drama, a gesture was required, so he raised the knife.

Gary Kasprack, the assistant principal, did his best to investigate the incident. There was a conflict in the testimony of eyewitnesses. The administrators did have a talk with the team after the incident. It was mere chance that Hopkins was out sick after he learned of the locker room notes and was not able to follow through with a team talk on the subject. The school handbook (R-26) says very clearly that carrying dangerous weapons calls for a minimum ten-day suspension. Fighting is not as serious an offense; thus D.S. received a three-day suspension.

FINDINGS OF FACT

1. While engaged in cross-country team activities in the fall of 1987, E.T., the only black team member, was occasionally subject to racial slurs and jokes and had notes with racial epithets placed on his locker. The notes said, "get out nigger," "better quit or we'll get you" and "no blacks."

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2. E.T., who is 16 years old, was disturbed by the overtones of racial harassment and considered quitting the team because he felt a black person was not welcome.

3. Although E.T. spoke to his coach and to a team member about the problem, his resentment and anger built up so that when his friend D.S. thoughtlessly made a racial remark on October 29, E.T. felt compelled to take action. He believed that if he fought D.S. it would put a stop to racial harassment by showing he was as "good" as the white boys, and he felt that it was too serious a matter to be tolerated.

4. D.S. was egged on to initiate a fight on October 29 and assaulted E.T. the minute they met in the school hallway.

5. E.T. was taken by surprise, was losing the fight and perceived himself to be the center of a hostile group of whites who were on the side of D.S., egging him on.

6. Given the excitement of the sudden fight and physical melee, none of the immediate participants retained a complete recollection of the movements of the participants.

7. D.S. tried to get back at E.T.; T.D. shoved E.T. out through the band room and stayed right behind him until E.T. was all the way out of the outside door and started to run around the building.

8. D.S. went up the hall toward the back of the building but then went outside through the side door to the corridor with the telephones. E.T. may have seen him come out.

9. E.T. believed T.D. and D.S. were chasing him; he was afraid and thought he would be safer inside the building since he thought they had come outside after him.

10. E.T. ran back through the front door and straight through the gym to the back of the building. He turned left and ran down the breezeway into the custodian's room.

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11. Since he did not want to exhibit his fear by "hiding" in the custodian's room and since he did not know if anyone was following him, he picked up a knife he saw there and came out, stomping down the hall, holding the knife straight down.

12. When he saw the whole group involved in the fracas was standing to his right at the intersection of the corridor by the telephone area, he raised the knife, more out of fear than to be threatening. In his frustration and anxiety, he said the first thing that came to mind, which was essentially, "I'm gonna get you tomorrow."

13. After extensive investigation and interviewing of eyewitnesses, Assistant Principal Kasprack imposed a ten-day minimum external suspension on E.T. in accordance with Board policy 5200. D.S. was given a three-day internal suspension.

14. On internal appeal, Superintendent Dinich modified E.T.'s suspension to five days external and five days internal. E.T. served three days of an external suspension. Dinich had concluded that the confrontation was not racially motivated.

15. The Board, after considering the matter, reduced E.T.'s suspension to eight days and made the five remaining days an internal suspension.

DISCUSSION AND CONCLUSION

Power to suspend is vested in each building principal subject to review by the local school board. N.J.S.A. 18A:37-4. The Commissioner has held that, since the issue of discipline is one involving the exercise of discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusions." C.B. v. Bd. of Ed. of City of Trenton, OAL DKT. EDU 6613-83 (March 14, 1984), adopted, N.J. Comm. of Ed. (April 30, 1984); Kopera v. West Orange Bd. of Ed., 60 N.J.Super. 288, 297 (App. Div. 1960).

The Sterling Administration properly investigated the events and, given the nature of the infraction (holding a knife in a threatening gesture), it was not unreasonable

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for them to apply the clearly-defined policy which resulted in a ten-day suspension. As each level of appeal was reached, more information tending to mitigate the severity of the offense emerged, so that the final determination of the Board was to assess an eight-day suspension: three days external (served) and five days internal.

I am precluded by the standard of appeal from substituting my own assessment for that of the Board. In my view, E.T. was afraid, and it was not unreasonable for a 16-year-old boy to perceive events as he did. He was the only black in a group of whites, some of whom were bigger, stronger and more mature than he. Prior racially-related remarks, particularly notes on his locker from a person or persons who could not be identified, elicited from E.T. a somewhat paranoid response, which spilled over into his relations with team members. It was normal from him to be sensitive to every remark as if it were aimed specifically at him. He was the only black there.

One can exercise one's imagination to create a situation with the shoe on the other foot. Would the school authorities have viewed the facts in the same light if one 16-year-old white boy had been similarly involved with a group of black teammates? The fact that the Board viewed the incident as it did was in no way unreasonable, however. Rather, it was somewhat less sensitive than it could have been. The administration took pride in what it believed to be excellent race relations in the high school. Thus, the authorities tended not to believe E.T.'s reports of racial slurs and notes on his locker. I would have believed it because kids do that sort of thing. When the entire picture was presented at hearing, one could readily see the basis for E.T.'s perceptions. Even so, it was reasonable to assess a three-day external suspension for cooling down, although D.S. was given an internal suspension. Precaution is necessary and reasonable since the authorities are responsible for the safety of all the students.

Thus, the fact that, having the advantage of hindsight and a more complete picture, I might consider the external suspension to be sufficient, is of no legal significance. I have discussed it at length because both parties were clearly very sensitive. The administration needs to recognize that no system is free of concerns about race relations, and it must be vigilant and thorough in its supervision, including after-hours supervision. E.T., Jr., must realize that physical encounters are not a mature response to racial or personal verbal denigration and that maturity includes an accurate perception of reality and emotional control.

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Having concluded that the suspension imposed on E.T., Jr., by the Board was a reasonable exercise of discretion, it is **ORDERED** that the petition be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

August 2, 1988
DATE

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

8/3/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 5 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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E.T., SR., on behalf of his son, E.T., JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is noted that no exceptions to the initial decision were filed by either party pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of those findings and conclusions set forth in the initial decision, the Commissioner adopts them as his own specifically for the reasons set forth therein.

In the Commissioner's view, the circumstances surrounding this incident reveal that the behavior of the pupils involved was not spontaneous.

According to the testimony of these pupils, it is evident that the incident arose from a culmination of prior events in which racially biased remarks were made. Regardless of how innocuous the pupils claimed such remarks were, they were tantamount to an "accident waiting to happen."

The Commissioner cannot condone the behavior of any of the pupils involved herein. It must also be pointed out that racially intolerant remarks do not promote harmonious relationships among pupils of different racial backgrounds; instead, such remarks and negative behavior by pupils toward each other can only engender fear, anger, distrust and possible violence among pupils who engage in such behavior.

The analogy made by the ALJ in the initial decision, ante, is especially appropriate given the factual circumstances recited above.

In the Commissioner's judgment, the school authorities may not adopt a complacent attitude in their efforts to promote an increased awareness and sensitivity to foster genuine opportunities for harmonious relationships among pupils of all races. While the school authorities must be commended for their past efforts in this regard, they must, as the ALJ has cautioned herein, recognize that

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no system is free of concerns about race relations and, therefore, the local school authorities must be vigilant in their efforts to supervise those pupils entrusted to their care, both during regular school hours and during after-school activities.

Accordingly, the Commissioner affirms the initial decision for the reasons set forth therein as supplemented above.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 15, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 47-87

AGENCY DKT. NO. 416-12/86

VINCENT MIRANDI,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner
(Ruhlman, Butrym & Friedman, P.A.)

Samuel A. Christiano, Esq., for respondent
(Christiano & Christiano, attorneys)

Record Closed: June 28, 1988 Decided: August 2, 1988

BEFORE **PHILIP B. CUMMIS**, ALJ:

A petition was filed with the Commissioner of Education on December 23, 1986 by Vincent Mirandi, a tenured employee in the West Orange School District. Petitioner

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sought the intervention of the Commissioner in order to gain the position of assistant principal of the Roosevelt Middle School, together with back pay, full benefits and all other emoluments denied petitioner as a result of respondent's failure to properly assign petitioner.

An answer to this petition was filed on January 2, 1987, and the matter was transmitted to the Office of Administrative Law on January 5, 1987, for a hearing and determination as a contested case, puursuant to N.J.S.A. 52:14F-1 et seq. The matter was then scheduled for a prehearing conference on March 19, 1987, before Administrative Law Judge Arnold Samuels. Judge Samuels at that time signed an order placing this case on the inactive list pending the outcome of the Capodilupo case in the Appellate Division (Capodilupo v. Bd. of Ed. of West Orange, OAL DKT. EDU 3814-84 (March 19, 1984), rev'd, Comm'r of Ed. (May 3, 1985), Capodilupo v. W. Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987)). Thereafter, the case was transferred to Administrative Law Judge Philip B. Cummis and was preheard on October 23, 1987. At the time of the prehearing, all issues and procedures were settled and the hearing was scheduled for April 11, 12 and 13, 1988, at 9:00 a.m., at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. On April 28, 1988, a telephone conference was held between all the parties and it was agreed that the matter would be submitted on the papers. The parties agreed to submit a stipulation of facts by May 16, 1988. Said stipualtion was received by the Office of Administrative Law on May 23, 1988. All briefs were due by June 20, 1988, and the last brief was received by me on June 28, 1988, at which time the record was closed.

ISSUE

1. Whether petitioner's tenure as an assistant principal in the high school includes the position of middle school assistant principal.

STIPULATION OF FACTS

1. Petitioner was employed by respondent, beginning in September 1963, as a social studies teacher at the West Orange Mountain High School.

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in which capacity he served continuously until the end of the 1980-1981 academic year.

2. Petitioner was properly certified to teach social studies and acquired tenure in said position.

3. In 1981, petitioner was appointed by respondent to the position of assistant principal at West Orange Mountain High School. Petitioner served in said position until the end of the 1983-1984 academic year, at which time he was the subject of a reduction in force. Petitioner was placed on a preferred eligibility list for the position of assistant high school principal. Petitioner has tenure as an assistant high school principal.

4. Petitioner was assigned at the start of 1984-1985 school year to the position of social studies teacher at West Orange High School. At the time of the filing of the petition of appeal (December 1986), he was serving in said position.

5. Petitioner presently serves as dean of students at West Orange High School.

6. Petitioner is the holder of a principal's certificate.

7. Mr. Joseph DelGercio has been employed by respondent as an assistant principal at the Roosevelt Middle School since December 1986.

8. Roosevelt Middle School is classified as a secondary school.

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All of the above having been stipulated as true facts by both parties, I accept the veracity of the stipulations and I **FIND** them to be factual and adopt them as part of my my findings in this case.

DISCUSSION

The petitioner herein is a certified tenured administrator whose job as high school assistant principal was abolished during a reduction and in force (RIF). For 17 years prior to 1981, he served as a social studies teacher at the high school with appropriate certification and awarding of tenure. He also has the certification necessary for and tenure status resulting from service as a high school assistant principal from 1981 until mid-1984. Since the RIF in 1984, petitioner has been on the preferred eligibility list for assistant high school principal. His present position is dean of students at the high school, although at the beginning of the appeal process, he was employed as a social studies teacher.

The relevant RIF in 1984 saw the shifting of various administrative staff members between the high schools and the junior highs and the retirement of others. Petitioner herein asserted a claim to one of the administrative posts at that time and was involved in a hearing before the OAL (Mirandi v. BOE of West Orange and Bernabe, OAL DKT. EDU 5756-84 (February 19, 1985), aff'd, Comm'r of Ed. (April 1, 1985) (Mirandi I)). At that time, it was shown that petitioner had the least seniority among the RIFFED administrators. The petitioner's claim was defeated in that attempt.

Two years after the RIF, another administrative position as a middle school assistant principal became available. Petitioner immediately asserted claim to that position, which was again rejected and that rejection is the focus of the instant controversy.

Although it is not stipulated, it is apparent from both petitioner's and respondent's briefs that the individual (DelGershio) placed in the controverted position

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was new to the district. DelGershio had eight years of experience as a middle school assistant principal, all outside the West Orange School District. The two years immediately prior to his West Orange appointment in Hopatcong and the previous six in Orange (respondent's brief of June 20, 1988, at 2.) Since neither party contests this statement, I **FIND** it to be factual and adopt it as part of this decision.

Petitioner contends that his tenure rights were violated when he was rejected and another individual (nontenured) was appointed to that position. Petitioner's assertion is that he is tenured on a district-wide basis and thus was entitled to the middle school position.

Respondent argues petitioner is entitled to preferred eligibility only as an assistant high school principal and petitioner is listed in that title. Respondent offers the additional contention that petitioner has no experience at all in junior high or middle schools.

LEGAL DISCUSSION

The instant inquiry concerns the nature of a school administrator's entitlement to a newly available position within the relevant school system subsequent to a RIF which abolished his original job.

School administrators' rights in a RIF are determined under a statutory scheme for public education set forth in N.J.S.A. 18A:1-1 et seq. Within this general all-encompassing education law, the legislators' provisions for RIFS were enacted as a part of the chapter entitled "Acquisition and Effect of Tenure" (N.J.S.A. 18A:28 et seq.) Specifically, Article 3 of Chapter 28 deals with the "Effect of Reduction of Force Upon Persons Under Tenure" (N.J.S.A. 18A:28-9 et seq.) The section devoted to reemployment rights after a RIF is N.J.S.A. 18A:28-12 and it refers to tenure in its title,

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"Dismissal of Persons Having Tenure on Reduction; Reappointment." The section provides:

> If any teaching staff member shall be dismissed as a result of said reduction, such person shall be and remain upon a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs from a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and determining seniority, and in computing length of service for reemployment, all recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such position within the district during the time of such military or naval service.... N.J.S.A. 18A:28-12 (emphasis added).

It should be noted that the statutory definition of "teaching staff member" as referred to in this section, includes every professional staff employee in the public education system (See, N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-3.4). Thus, the classification includes administrators. Further, the provision indicates that reemployment must be automatic as long as its criteria are met. There is no opportunity afforded to school boards to use discretion in these situations. The relevant statutory criteria involve tenure and seniority in a position.

The standards for tenure are set forth in N.J.S.A. 18A:28-5 and 6. Generally, tenure is earned upon completion of three years of service in a district (§5). Upon transfer, the individual retains the prior tenure and acquires tenure rights in the new title after two years (§6). It is noteworthy that tenure is determined in relation to time served in a particular position, not in broader classifications. (See, N.J.S.A. 18A:28-5 and 6). See also, Forte v. Bd. of Education of Belleville, OAL DKT. NO. EDU 5423-87. (April 14, 1988), aff'd, Comm'r of Ed. (May 25, 1988) (tenure found to attach to position, not to a broad certification).

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The Legislature has also addressed the establishment of standards of seniority, expressly authorizing the Commissioners to formulate them (N.J.S.A. 18A:28-13). Pursuant to the statutory direction, the Commissioner promulgated N.J.A.C. 6:3-1.10 detailing the standards for determining seniority. The language of that regulation is of particular relevance to the instant matter follows:

> (b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq. shall be determined according to the number of academic or calendar years of employment or fraction thereof, as the case may be, in the school district in underlying specific categories as hereinafter provided....
>
> ...
>
> (i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for the employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category, and shall be placed and remain upon the preferred eligibility list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.
>
> ...
>
> (k) In the event of his or her employment in some category to which he or she shall revert, he or she shall remain upon all the preferred eligibility lists of the categories from which he or she shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his or her seniority entitles him or her.
>
> (l) The following shall be deemed to be specific categories following two categories but not necessarily numbered in order of precedence. . . .
>
> 11. High School Vice-Principal or an Assistant Principal;

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12. Junior High School Vice-Principal or an Assistant Principal: N.J.A.C. 6:3-1.10 (emphasis added).

It is of significance to the instant discussions that, pursuant to the regulations, seniority is based on time employed in a specific category and that there are separate categories for assistant principals of high schools and those in junior high schools.

Thus, there is a statutory and regulatory basis for the conclusion that a RIFfed tenured employee with seniority in a category has an automatic entitlement to a position in that category. See, Villarin v. Bd. of Ed. of Essex County Voctech High School, OAL DKT. EDU 150-86 (Nov. 21, 1986), aff'd, Comm'r of Ed. (Jan. 6, 1987), aff'd, State Board (June 5, 1987). (Board found without discretionary authority to bypass the most senior person on the relevant eligibility list when opening occurred after a RIF.)

However, seniority is not the controlling issue in the instant case. Under the clear standards of the regulation (N.J.A.C. 6:3-1.10) the petitioner would have seniority only in the category of high school assistant principal (category 11) not as a junior high or middle school assistant principal (cateogry 12). This was the basis for the finding against the instant petitioner the first time he attempted to assert his reappointment rights in 1986 (Mirandi I). In Mirandi I, the ALJ stressed that petitioner's tenure as an assistant principal before the RIF was irrelevant to the Board's action in filling a vacancy in that position in a different category (Id., at 9). Thus, a person without tenure as an administrator was allowed to remain in that position while petitioner's tenure as an administrator was ignored.

In the interim since Mirandi I, the rights of tenured staff affected by RIFs have been addressed in two published Appellate Division decisions as well as in other forums.

Significantly, one of the published decisions involved the same respondent as in the present matter. Capodilupo v. BOE of West Orange, 218 N.J. Super. 510 (App. Div. 1987) determined the rights after a RIF of a tenured secondary school physical education

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teacher as against those of an incumbent nontenured elementary teacher with the same certification. The Capodilupo court expressly refuted the notion that tenure is irrelevant in a RIF (the theme of Mirandi I). Capodilupo, at 515. Instead, it stressed that tenure is the statutory threshold to assertion of rights in a RIF. Ibid. The Appellate panel reiterated the well-respected premise that liberal construction of the tenure statute is required to ensure the accomplishment of its goal to provide job security for eligible staff. Ibid. See, Spiewak v. Rutherford BOE, 90 N.J. 63 (1982) (Tenure held to be a statutory protection precluding exceptions based on contract concepts). In keeping with the purpose of the tenure law, the court held that "[a] tenured teacher. . .is entitled to retention as against a nontenured teacher. . .." Capodilupo, at 515. It thus paved the way for the former secondary school teacher to take over the elementary school job of an incumbent nontenured person. It is noteworthy that the difference in categories, Secondary or No. 15 versus Elementary or No. 16, was of no conseqence to the Capodilupo conclusion.

In the instant matter, respondent relies on Capodilupo for the proposition that that case is authority for the school board's application of an "educationally based reasons" test, respondent's brief of June 20, 1988, at 5. Thereunder, respondent claims that the nontenured person has preference due to his years of middle and junior high school experience outside the relevant school district as against the tenured petitioner whose experience is only at the high school level.

It appears that respondent's reliance on Capodilupo as authority for the use of this discretionary test in this instance is misplaced. In the first place, the Appellate Division only mentioned the test and expressly stated that it was not addressing its merits, Capodilupo at 516. In the second place, the State Board clearly noted that the test was to be applied where the nontenured person had singularly specialized training and fulfilled unique duties, Capodilupo v. BOE of W. Orange, et al., State Bd. of Ed. (Sept. 5, 1986). In contrast, the State Board was affirmed by the Appellate Division in its ruling that the tenured person had a statutory entitlement to preference in a RIF over an

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incumbent nontenured person with similar certification, Capodilupo, at 515. Soon after the Capodilupo decision, the Appellate Division repeated and reinforced its determinations in Bednar v. Westwood BOE, 221 N.J. Super. 239 (App. Div. 1987). Here petitioner was an elementary art teacher who was reduced to part-time status by a RIF. The court considered his right to a secondary school position held by an experienced nontenured individual. The panel emphasized that seniority protection is not available to nontenured personnel, Bednar, at 242. It stressed that tenure is statutory, while seniority is a concept deriving from the tenure statute and is categorized pursuant to an implementing regulation. The Bednar panel proclaimed that "the rights conferred by the tenure statute may not be dissolved by. . .regulations." Bednar, at 243. Thus, the court decided that the tenured elementary school teacher was entitled to the occupied secondary school position.

It is noteworthy that both the Capodilupo and Bednar panels decided in favor of tenured staff over nontenured incumbents within the same certification but in different categories.

Bednar and Capodilupo were the foundation for another recently decided OAL case, Schaeffer v. BOE of S. Orange-Maplewood, OAL DKT. EDU 5776-87 (Jan. 15, 1988), aff'd, Comm'r of Ed. (March 14, 1988). This involved a junior high/middle school supervisor of English, reassigned to the classroom after a RIF. The Board had abolished his position and soon thereafter created a new position, that of Director of Language Arts for kindergarten through grade 8. Petitioner applied and was rejected for the new position which was filled by an individual without experience or tenure in the district. The Board claimed petitioner's experience was not "district wide" and, on this basis, he was not the proper person for the job. Herein, the similarities in certification needed and duties and responsibilities of the relevant positions were analyzed, Schaeffer, Comm'r's Decision, at 12-13. It was stressed that the positions were similar, not identical. Ibid. Again, the finding was in favor of the tenured petitioner based on his statutory tenure protection. Ibid.

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It is obvious that the conclusions reached in Mirandi I would not survive an appeal in light of current interpretations of the scope of protection for tenured personnel in a RIF. As to the instant controversy, the petitioner does not assert his claim against an incumbent as in Capodilupo and Bednar. His cause is thus that much more advanced since the other individual has no experience in the relevant school district. As was the case in Schaefer, this petitioner asserts a claim to a comparable assignment within the certification he already holds. Pursuant to the statutes and the case law, it would not appear that there is any basis to defeat his claim over a nontenured person.

Finally, there is an underlying concern in many similar controversies that the true reason for a Board's failure to appoint personnel is some dissatisfaction with the person's prior performance on the job. The appropriate course for the Board to follow in that case would be to seek relief through the hearing procedure provided at N.J.S.A. 18A:6-9 et seq. See, Forte, Comm'r's Decision, at 17.

CONCLUSIONS

I therefore **CONCLUDE** that petitioner comes within the protection of the tenure statute. It has been determined in the case law that the specific criteria for seniority entitlement to preference and job placement after a RIF are to be applied only to contests between similarly certified tenured individuals. In those situations, nontenured persons are not eligible for placement in positions or to retain positions as against tenured applicants.

When the individuals involved are all tenured, seniority rankings on eligibility lists are revelant. Pursuant to the regulations, high school assistant principals are in a separate seniority category from junior or middle school assistant principals. It would appear that even though the district considers both levels as secondary, the difference in official categories could control. Thus, if the other individuals had tenure within the district, said individual may have had a seniority right to the position.

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However, this was not the case in the instant manner. The petitioner has tenure and the necessary certification for the position and deserves protection from the nontenured teacher.

I therefore **FIND** that the petitioner is entitled to the position of assistant principal of the middle school in the West Orange School District. I further **FIND** that petitioner is entitled to back pay, full benefits, tenure and seniority as assistant principal in the Roosevelt Middle School together with any additional emoluments which he has been denied as a result of respondent's failure to properly assign petitioner.

It is hereby **ORDERED** that petitioner be immediately assigned as assistant principal to the Roosevelt Middle School in accordance with my findings, and

It is further **ORDERED** that he be **RESTORED** his back pay, full benefits, tenure and seniority in that position, together with all other emoluments denied as a result of respondent's failure to properly assign petitioner.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

8/2/88
DATE

PHILIP R. COMMIS, ALJ

Receipt Acknowledged:

8/5/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 5 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

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VINCENT MIRANDI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were not timely filed pursuant to N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner is in agreement with the ALJ's conclusion that petitioner had entitlement to the contested middle school assistant principal position when it became vacant by virtue of his statutory tenure rights over a nontenured individual. Capodilupo, supra; Bednar, supra Notwithstanding the fact that the Board believes it had educational reasons for not appointing petitioner to the middle school position, lack of service as an assistant principal at that grade level cannot thwart petitioner's tenure rights to a vacant assistant principal position over a nontenured individual whether it be at the elementary, middle, junior high or senior high school level. As expressed in the State Board's decision in Capodilupo, tenure is achieved in a particular "position," the scope of which is limited by the scope of the certificate required to hold the "position." N.J.S.A. 18A:28-5 specifically identifies assistant principal positions as separately tenurable positions. The specific endorsements on the administrative certificate necessary for assignment to such a position pursuant to N.J.A.C. 6:11-10.4 authorize one to serve at all grade levels. Thus, petitioner has entitlement over a nontenured person to any assistant principal position which became vacant. N.J.S.A. 18A:28-5, Capodilupo, Bednar The Board's argument of lack of experience simply does not alter that statutory right not- withstanding the State Board's allowing the West Orange Board to retain a nontenured physical education teacher over a tenured one in Capodilupo because the nontenured individual possessed specialized training for teaching adaptive physical education which the tenured teacher did not possess. While the Appellate Division in Capodilupo declined to rule on the specialized training issue raised regarding one of the two elementary physical education teachers, Bednar is considerably more emphatic in asserting the rights of tenured individuals serving under the same certificate endorsement. Further, even assuming arguendo that the specialized training does continue to have legal weight, in the Commissioner's view, the nature of any difference in experience between an elementary vice principal and that of a middle school vice principal cannot be considered to be of such a nature as to claim the right of exception raised by the Board in this matter.

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Accordingly, the ALJ's recommended decision is adopted for the reasons stated in the initial decision. The Board is directed to carry out the orders contained in that decision with respect to petitioner being made whole.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 15, 1988

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7865-87
AGENCY DKT. NO. 330-11/87

MARLENE LEEB,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Michael J. Rogers, Esq , for respondent

Record Closed: June 24, 1988 Decided: August 5, 1988

BEFORE **JOSEPH LAVERY,** ALJ:

Marlene Leeb (petitioner) appeals to the Commissioner of Education for a correction of the amount of wages paid her by **respondent Holland Township Board of Education (Board).** These wages were in compensation for 75 days of her employment in the school district, during the school year 1987-88. At issue is both the total amount paid for that period, as well as the per diem rate upon which it was calculated. Petitioner also asks for legal interest on the monies sought.

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PROCEDURAL HISTORY

After timely appeal and answer, the **Commissioner of Education** declared this matter a contested case, pursuant to N.J.S.A. 52:14B-9 and 10. Thereafter, he filed it in the Office of Administrative law **(OAL)** on December 1, 1987. The **Acting Director and Chief Administrative Law Judge** then assigned the case for hearing to the **Honorable Daniel B. McKeown, ALJ,** who adjourned the case for cause on February 1, 1988. It was thereafter reassigned to **this administrative law judge,** who convened a prehearing conference on March 2, 1988. Thereafter, plenary hearing, converted to prehearing conference, was held on May 18, 1988, in the **Frenchtown Borough Municipal Court**. A stipulation of facts was entered into the record, preliminary to an agreed upon motion, and cross motion, for summary decision, pursuant to N.J.A.C. 1:1-12.5. Briefs followed, the last of which was received on **June 24, 1988**. On that date the record closed.

ISSUES

The issue, generally stated, is whether the Board properly calculated petitioner's salary for the 75 days of her contractual employment. Those days occurred prior to the date of her resignation, effective October 14, 1987, during the 1987-88 school year in the Holland Township School District. More particularly, however, this issue may be refined to the following questions:

1. **Whether petitioner's calculation of monies owed to her is correct, factually and legally. Petitioner asserts that she is entitled to a per diem rate of $178.46 (calculated at 1/240 days) for the 1987-88 school year. In total, this amounts to $13,384.50.**

2. **Whether petitioner is owed the sum of $1,030.25, plus legal interest (computed pursuant to court rule). The Board, adhering to its own calculations, has disbursed only $12,354.75, based on a rate of $164.73 per diem (calculated at a rate of 1/260 days) for that period .**

Burden of Proof:

The burden of proof in this matter falls on **petitioner**, who must carry it by a preponderance of the credible evidence.

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Undisputed Facts:

The facts in this matter have been stipulated, in a document executed by both parties, and admitted into evidence as **J-1**, at the conference on **May 18, 1988**. That stipulation is set out verbatim, as follows:

1. Respondent is organized under the laws of the State of New Jersey and is responsible for the administration of the Holland Township School District in the County of Hunterdon.

2. Petitioner was a tenured teaching staff member in the Holland Township School District, having been employed as a teacher and administrator from on or about September 1970 through August 31, 1987.

3. For the period July 1, 1987 through June 30, 1988, petitioner and respondent were parties to an employment contract in which petitioner was to receive a salary of $42,830.00 to be paid in twenty-six (26) bi-weekly installments. A copy of the employment contract is attached hereto as Exhibit A.

4. In July 1987 petitioner accepted employment as Chief School Administrator in the Borough of Stockton School District, Hunterdon County. Petitioner submitted a letter of resignation to the Superintendent of the Holland Township School on July 31, 1987, effective October 14, 1987. A copy of the letter of resignation is attached hereto as Exhibit B.

5. By letter dated August 6, 1987, respondent's Board Secretary/Business Administrator informed petitioner that her salary would be adjusted and that her final 1987-1988 salary would reflect seventy-five (75) days worked, including vacation days, at a per diem rate of $164.73 for a total of $12,354.75. A copy of such letter is attached hereto as Exhibit C.

6. The aforementioned per diem rate was established by dividing the annual salary of $42,830.00 by 260 days. If the petitioner's salary was based upon a denominator of 240 days, her per diem rate would be

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$178.46 which would have resulted in a final 1987-1988 salary of $13,384.50.

7. Exhibit D was prepared by Board Secretary and received by petitioner.

8. Copies of applicable Board Policies are attached hereto as Exhibit E.

On these facts, the appeal proceeds.

ARGUMENTS OF THE PARTIES

Petitioner's Argument:

Petitioner contends that the employment contract is clear. During the 1987-88 school year, petitioner was to be paid a salary of $42,830 in equal installments, in accordance with the then prevailing policy of the Board for payment of professional staff members (J-1, Exh. A) The particular policy of the Board relevant here (J-1, Exh. E), comports with N.J.S.A. 18A:27-6. To have been true to this statutory section, the Board would have had to pay petitioner her $42,830 salary in equal bi-weekly installments for the 1987-88 school year. Though the statute requires semi-monthly or monthly payments, the Commissioner of Education has determined that bi-weekly payments are consistent.

At the outset of the 1987-88 school year, the bi-weekly payment to petitioner was $1,647.31. She received that amount on July 3, July 17, July 31, and August 14. However, following petitioner's resignation letter of July 31, 1987, the Board Secretary, on August 6, 1987, unilaterally changed petitioner's bi-weekly check, effective August 28, to $1,441.38 (J-1, Exh. C). Payment in that amount continued on September 11, September 15, and October 9, as well as, proportionately, for three-tenths of a pay period to October 14, the effective date of resignation. The Board chose to make this change on a per diem calculation, in violation of respondent's own salary payment policy, which calls for bi-weekly payments.

The Board may not lawfully violate its own policy, it has been held in a previous ruling of the Commissioner of Education. Consequently, petitioner's salary should have continued at the bi-weekly rate of $1,647.31, through the last full bi-weekly period ending October 9. She then should have been paid three-tenths of

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$1,647.31, for the partial pay period running from October 10 through October 14, 1987. Her total compensation then would have amounted to $13,672.67 instead of the $12,354.75 actually paid by the Board.

In the alternative, if, as a matter of law, the ALJ should find a per diem rate of pay appropriate, the applicable ratio is not 1/260. Instead, it should be 1/240, as is required by N.J.S.A. 18A:27-6. Under that statutory provision, a 20-day month must be used when the contract is silent, as here. Multiplying 12 months by 20, the number of contractual days would be 240. The proper formula for calculating petitioner's final salary then is

$$\$42,830 \times 75/240 = \$13,384.50$$

Using that formula, it is clear how respondent was underpaid in the amount of $1,029.75

In sum, if the per diem rate is found unlawful, as it should be, the amount owed petitioner is $1,317.92 If, in the alternative, the per diem rate is upheld as a matter of law, then, pursuant to N.J.S.A. 18A:27-6, the denominator must be 1/240 (rather than 1/260), disclosing an underpayment of $1,029.75.

Petitioner rejects the Board's contention that she had earlier conceded the propriety of per diem payment, through acquiescence. She argues that whether the Board previously calculated respondent's pay using a ratio of 1/260 in 1984 is irrelevant. Petitioner's election not to appeal this unlawful ratio at the time should not bar her present, timely appeal from the instant Board error. Neither should the Board's policy of a 1/260 ratio for "docking" pay after excess absences be held applicable to the present fact setting. In any event, that specific use was meant to benefit employees, not work to their detriment, as here.

Board's Argument:

The Board contends that its policy is to compensate in bi-weekly installments (J-1, Exh. E, page 3). This policy is consistent with N.J.S.A. 18A:27-6. On the other hand, it is also plain that the Board authorizes a per diem rate of payment for 12-month employees in the amount of 1/260th of the annual salary (J-1, Exh. E, page 1)

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Since petitioner was a 12-month employee, this policy applies (52 weeks x 5 days per week = 260)

In further objection, the Board opposes consideration of an issue brought for the first time, outside the pleadings and the prehearing order. Petitioner had not heretofore contended that a per diem calculation violated Board policy. Consequently, this contention should be excluded from review. However, should this tribunal nevertheless give it consideration, it ultimately should be ruled that petitioner's argument lacks merit.

The operative fact is that petitioner was paid on a bi-weekly basis. Nevertheless, she should not be compensated for more days than she worked. If petitioner had remained in employment from July 1, 1987 through June 30, 1988 at a salary of $42,380, she would have received 26 payments at $1,647.31. However, she worked only from July 1, 1987 through October 13, 1987 (October 14, the day she effectively resigned, cannot be included, by definition). The facts show that she was paid for each day actually worked:

Pay Period	Pay Date	# Days Earnings	# Days Paid	Contracted Earnings	Actual Payments	Balance Due Bd.
1	7/3/87	3	10	494.19	1,647.31	1,153.12
2	7/17/87	10	10	1,647.31	1,647.31	1,153.12
3	7/31/87	10	10	1,647.31	1,647.31	1,153.12
4	8/14/87	10	10	1,647.31	1,647 31	1,153.12
5	8/28/87	10	10	1,647 31	1,647.31	1,153 12
6	9/11/87	10	8.3	1,647.31	1,372.74	878.55
7	9/25/87	10	8.3	1,647.31	1,372.74	603 98
8	10/9/87	10	8.4	1,647.31	1,372 74	329.41
9	10/24/87	2	0	329.41	0.00	0.00
Totals		75	75	12,354.77	12,354.77	0.00

The above chart confirms that, had petitioner worked a full year, her bi-weekly payments would have continued at $1,647 31. However, she chose not to do so. The varying bi-weekly payments necessarily reflect the Board's fiscal adjustment to that change In the board's opinion, petitioner selectively ignores the advantage she enjoyed from July 3, 1987, at the beginning of her employment. From thence,

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for three days' work, she received 10 days' pay (actual payment: $1,647.31, earned payment: $494 19). Decreases in compensation toward the end of her employment are a proportional reaction to that overage. The adjustments made over the span outlined above must be assessed on the whole. In full, the chart reflects a per diem calculation which is unavoidable, when an employee does not work a full contractual year

Petitioner's assertion of N.J.S.A. 18A:27-6, in justification of a per diem rate of 1/240, as opposed to 1/260, is specious. That section merely defines a month as 20 school days, if not otherwise specified in the contract. Her contract unambiguously referred to the policy of the Board, which calculates exit pay at a per diem rate of 1/260 (J-1, Exh. E, page 1).

Finally, the Board insists that, obviously, petitioner knew and accepted this disputed ratio. She assumed administrative responsibilities in the 1984-85 school year while paid precisely at the per diem rate of 1/260 for 12-month employees (J-1, Exh. D).

ANALYSIS

This case is ripe for summary decision, pursuant to N.J.A.C. 1:1-12.5. There is no genuine issue as to any material fact challenged, and the moving party is entitled to prevail as a matter of law, N.J.A.C. 1:1-12.5(b), Judson v. Peoples' Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954).

Petitioner asks that relief be granted on the alternative theories that: **first**, her compensation should have continued bi-weekly, and the Board was barred from unilaterally converting to per diem calculation. **Second**, if per diem is ruled lawful, the mandatory ratio to have been applied by the Board was 1/240, rather than 1/260. Analyzing those two theories in their order:

I

First, the undisputed facts record that payment did adhere to a bi-weekly schedule, (J-1, Exh E, section I) It was only in order to adjust payment to reflect the days actually worked that the Board resorted to reduction of each bi-weekly amount, and to per diem computation. In these circumstances, the Board could

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lawfully do so, notwithstanding that N.J.S.A. 18A:27-6 speaks only to semi-monthly or monthly installments. The Board policies, and their interpretation, amply disclose, and support, its practice of per diem payment in these circumstances, (J-1,Exh. E, section II, and Exh. D).

The legal reasons justifying the Board's actions may be found in school law decisions. The Commissioner of Education has construed N.J.S.A.18A:27-6 to permit payment of wages bi-weekly, rather than twice a month. The Commissioner did so in the case of In the Matter of Township of Brick, Ocean County, 1977 S.L.D. 704, 706. In another case, the Commissioner ruled that conversion from a bi-weekly salary payment to a per diem rate is permissible, when a local Board relies on that ratio to determine a teacher's last salary payments (as in the instant situation) Parker v. Hammonton Tp. BOE, 1980 S.L.D. 58, 63.

On first reflection, the reasoning in the former of the foregoing two cases seems at odds with the result of the latter. However, closer scrutiny shows otherwise. In Parker, the Commissioner could not countenance per diem only because the Board violated its own policy, which was strictly limited to bi-weekly salary payments. The Commissioner did not rule out per diem payments, per se. From these two holdings, it must be concluded that bi-weekly payment of salaries is permissible, notwithstanding the facial wording of N.J.S.A. 18A:27-6. Further, if authorized in standing Board policy, per diem calculation of monies to be paid an exiting teacher is lawful, when utilized to avoid payment for any days not worked during the overall course of employment.*

II

Second, having found the per diem calculation lawful (at least under the circumstances of this case), it is equally appropriate to rule that the proper ratio is 1/260. Board policy authorizes 1/260 (J-1, Exh. E, page 1 of 2, "Deduction, etc.", subsection B; Exh. D). Petitioner's employment contract itself alludes to Board policy as a basis for calculation. It is not silent, as petitioner suggests (J-1, Exh. A, par. 1).

***It need not be decided today whether per diem wages in any other circumstances is consistent with N.J.S.A. 18A:27-6.**

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Petitioner's defense is persuasive that she cannot be held as having agreed to the lawfulness of that ratio in 1984, simply because she failed to complain. However, that is not the significance of what occurred in 1984. The relevant import lies in the Board's practice itself. The fact that respondent calculated her 1984-85 salary in that fashion supports the Board's interpretation that it relied on the ratio of 1/260 across-the-board, not just to fix the financial impact of excessive absences (J-1, Exh. E, p 1) Specifically, the Board also relied on the ratio of 1/260 to resolve unexpected calls for piecemeal computations of salary. In petitioner's case, such unanticipated fiscal demands were prompted by her title change, and finally by her separation from employment.

Most persuasive, however, is IMO, Brick Tp., BOE, supra, 1977 S.L.D., at 705. There, quoting a relevant case, the Commissioner held:

> The Commissioner is constrained to reiterate that which was stated in Joseph McKay v. Board of Education of the Borough of Red Bank, Monmouth County, 1982 S.L.D. 606, as follows:
>
> > "***Petitioner is not entitled to reimbursement of salary *** by virtue of the fact that he was not suspended, but voluntarily refrained from rendering any service during the course of this litigation. (N.J.S.A. 18A:6-30). *Any such payment would constitute a gift of public funds for services not rendered, which is clearly prohibited by the law of this State. New Jersey Constitution, Art. VIII, Sec. III, Pars. 2, 3." (Emphasis supplied.)* (at 611)

The chart of payments (Resp br. p. 4) to petitioner for the 1987-88 school year is enlightening. It discloses that the Board's bi-weekly reductions, and its final departure from bi-weekly payments, were, in essence, steps taken to recapture funds. Those funds were initially expended for wages in excess of the number of days during which petitioner was in actual employment status.. These adjustments by the Board were consistent with the aforementioned school law decisions, and make sense in the context.

The legislative intent of N.J.S.A. 18A:27-6 cannot be construed to affirm payment for days not worked. Rules of statutory construction are subordinate to the proposition that a statute will not be interpreted to lead to absurd results. State v. Provenzano, 44 N.J. 318 (1961). Ascertainment of intent is necessarily a matter of reconstruction, and has elements of fiction; a court's realistic approach should be to

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try to make sense out of legislation, insofar as text and context may allow, Cty. of Clifton v. Zweir, 36 N.J. 309, 323 (1962).

CONCLUSION

I **CONCLUDE**, therefore, based on the exhibits and arguments of the parties, and for the reasons set forth in the ANALYSIS portion of this opinion, that:

1. The respondent Board paid petitioner on a bi-weekly schedule.

2. Respondent Board relied on, and made use of, a per diem calculation of 1/260, in conformance with existing Board policy. It did so to avoid payment for days not worked, through the lawful administrative device of fiscal adjustment.

3. Respondent Board did not violate N.J.S.A. 18A:27-6 in paying petitioner $12,354.75, at a rate of $164.73 (calculated 1/260), for the 75-day period during which she was employed in the 1987-88 school year.

ORDER

I **ORDER** therefore that petitioner's appeal for additional compensation, be, and hereby is, **DENIED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

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I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

August 5, 1988
DATE

JOSEPH LAVERY, ALJ

Agency Receipt:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 10 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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MARLENE LEEB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner contends the ALJ misapplied the holding in Parker v. Hammonton Board of Education, 1980 S.L.D. 58. She emphasizes that aspect of Parker wherein it states:

> The Commissioner finds that the Board violated its own policy of bi-weekly salary payments by reverting to a per diem rate of compensation to determine petitioner's last salary payments.
> (at 63)

Petitioner claims that it is uncontroverted that, for the 1987-88 school year, her biweekly salary payment was $1,647.31. "After notification of her intention to leave the district, the Board Secretary notified petitioner that the bi-weekly payments were being altered to reflect a per diem rate of pay (Exhibit C) in violation of local board policy #4140 (Exhibit E)." (Exceptions, at p. 2) Petitioner suggests this action is in contravention of the Commissioner's holding in Parker, supra, and, thus, the recommendation of the ALJ allowing the per diem calculation must be rejected.

In the alternative, if the per diem calculation is affirmed, petitioner submits that the ALJ erred in determining 1/260 was the correct factor. She claims that N.J.S.A. 18A:27-6 requires a per diem rate of 1/240. She explains as follows:

> N.J.S.A. 18A:27-6 requires that unless otherwise specified in the contract, a month is to be construed as 20 school days. The contract specifies a work year from July 1 through June 30 which is 12 months. Twelve months (12) multiplied by the twenty school days (20) provided in the statute equals 240. Therefore, the per diem rate is 1/240, and not 1/260. The Board Secretary in contravention of the statute utilized 52 weeks

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> multiplied by 5 school days to arrive at 260 (Exhibit C). This calculation has no justification in law. (Exceptions, at p. 3)

Petitioner avers, therefore, that the ALJ incorrectly concluded that the Legislature could not have intended what the statute mandates and cites In re Jamesburg High School Closing, 83 N.J. 540 (1980) in support of this proposition.

Petitioner also challenges the language of Policy #4140 averring that the only mention of 1/260 is in Policy #4142/4242 which refers to "Deduction for Absence in Excess of Days Allowed Except for Sick Leave." (Exceptions, at p. 4, quoting Policy #4142/4242) Petitioner contends this policy section is not relevant to the instant matter since Policy #4140 specifically concerns per diem rates of pay. Moreover, petitioner avers the use of the higher denominator in this policy is to the employee's advantage because it results in a lesser amount of money being deducted for excess absences.

In the alternative, if the Commissioner determines that a per diem rate is appropriate, petitioner avers, consistent with N.J.S.A. 18A:27-6, that the denominator to be used in the calculation should be 240 and that the use of the denominator 260 contravenes the statute and Board Policy #4140. Petitioner requests that she be awarded $1,029.75 for underpayment of her final salary resulting from the use of the unlawful denominator.

The Board's reply exceptions argue that petitioner's contention that the ALJ misapplied the holding in Parker, supra, misstates the ALJ's findings of fact, holding and rationale. The Board claims the petitioner in Parker worked a full biweekly term and the decision implicitly holds that she was entitled to be paid in accordance with board policy based on such facts. The Board claims the Commissioner in Parker found that the board therein violated its own policy in reverting to a per diem rate of compensation to determine petitioner's last salary payments, citing Parker at page 63 in support of this contention. The Board contends the ALJ properly concluded that under the instant circumstances the Board did adhere to its biweekly payment schedule in compensating petitioner. It claims the ALJ properly found that calculation of payment for seven days petitioner did not work was in accordance with long-standing Board policy as well.

The Board would have the initial decision affirmed and refers the Commissioner to its brief filed with the ALJ in support of its position. Said post-hearing submission is incorporated herein by reference.

Upon his careful and independent review of the record, the Commissioner modifies the initial decision for the reasons that follow.

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Initially, the Commissioner finds that neither Policy #4140 nor #4142/4242 addresses the situation at hand. Policy #4140, while it addresses pay for permanent personnel, speaks at Paragraph II, Sections A and B to per diem rates of pay for 10-month staff members only. Nowhere are 12-month employees mentioned in said policy. Further, while it does address employees under a 12-month contract, Policy #4142/4242 is inapposite herein because 12-month employees are mentioned under a section pertaining to deductions for absences in excess of days allowed except for sick leave. Even if the reference to 12-month employees in this section provided some notice to petitioner that the per diem rate upon which her services would be calculated applied a denominator of 260 because policy #4142/4242 so states 1/260 as the pay rate for each day a 12-month employee is absent while applying a denominator of 185 for 10-month employees, the policy is inconsistent with the denominator established in policy #4140. In that policy, 10-month employees receive a per diem rate of pay for personal disability due to illness or injury applying a denominator of 200 not 185. The Commissioner finds these two policies are inconsistent with each other and provide no clear indication or notice of what an appropriate denominator in the district is for tallying a per diem rate for an employee no longer in the Board's employ.

More significant is the fact that the Board does not contest the fact that it ceased paying petitioner as a salaried employee as of the next pay period from when she apprised the Board of her intent to resign, specifically as of pay period 6, pay date September 11, 1987. (See Board's Letter Memorandum, at p. 4.) As a contracted, salaried employee who enjoys the mode of compensation and emoluments that attach thereto, no reduction in her check should have occurred until after the pay period nearest to the effective date of her resignation, October 14, 1987, in this case, after pay period 8 on October 9, 1987. Any adjustments for days worked beyond October 9, 1987 should have been reflected in her final pay check from the district issued on October 24, 1987. Moreover, the Commissioner finds no basis for "docking" petitioner's final adjusted salary four days in the first pay period, the pay date for which was July 3, 1987, in that the law clearly holds that compensation shall not be paid until the employee renders the service. See In the Matter of the Request of the Board of Education of the Township of Brick, Ocean County, for a Declaratory Judgment Concerning the Payment of Salaries, 1977 S.L.D. 704, 705 ("***the payment of salary *** for the majority or total of a pay period in which teachers have not yet rendered a proportionate number of days of teaching services is illegal.) Accord, Jon Caroselli v. Upper Freehold Regional Board of Education, 1981 S.L.D. 109, aff'd St. Bd. 120, aff'd in part/rev'd regarding reimbursement N.J. Superior Court, 1982 S.L.D. 1452. Thus, the Commissioner finds that the Board erred in paying petitioner for a full ten-day pay period in advance of her having performed her duties for that number of days. The Commissioner hereby directs the Board to conform its pay period schedule to assure that employees are not compensated in advance of rendering services for the commensurate number of days.

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Finally, the Commissioner finds and determines that the per diem calculation devised by the Board in determining what compensation may be due petitioner for the three days she worked during pay period 1, and the two she worked during pay period 9, is inappropriate for a salaried employee pursuant to N.J.S.A. 18A:27-6. Rather, the Commissioner adopts the system as illustrated in the case entitled Gladys Bruner v. Board of Education of Upper Freehold Regional, 1980 S.L.D. 1097, 1098, which calculated salary due that petitioner by dividing the bimonthly salary entitlement by the proportion of the pay period for which she worked. In the instant matter petitioner worked three days in pay period 1 and also worked two days in pay period 9 which equals five days or one-half a biweekly pay module. $1,647.31 divided by two equals $823.66. Additionally, petitioner worked seven biweekly pay periods which totals $11,531.17. Adding $11,531.17 and $823.66 brings the amount of compensation due petitioner for the period she was employed during the 1987-88 school year to $12,354.83.

Accordingly, the Commissioner adopts as his own only conclusion 1 as recited by the ALJ in the initial decision, ante, and only to the extent that the Board did so until it became aware of her intent to resign. He finds a per diem compensation calculation inappropriate for calculating salary owed teaching staff members. He further finds the Board was in error calculating salary payable as it did for the period during which petitioner was employed by the instant Board during the 1987-88 school year, for the reasons expressed above.

Consequently, while the Commissioner does not disturb the final amount of $12,354.75 as the proper amount due as compensation to petitioner for the time period in question, he modifies the initial decision to the extent expressed above. Therefore, for the reasons expressed herein, petitioner's appeal for additional compensation is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

September 16, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8223-87
AGENCY DKT. NO. 346-12/87

F.M. and C.M. on behalf of their son V.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, Hudson County,
Respondent.

Eric M. Bernstein, Esq., for petitioners
(Vaida & Vaida, attorneys)

Joseph Ferrara, Esq., for respondent
(Krieger and Ferrara, attorneys)

Record Closed: June 24, 1988 Decided: August 8, 1988

BEFORE EDITH KLINGER, ALJ:

On November 19, 1987, F.M. and C.M. on behalf of their son, V.M., a minor, filed a petition of appeal with the Commissioner of Education alleging that on September 10, 1987 the Board of Education (Board) imposed an indefinite out-of-school suspension on

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V.M. without affording him the opportunity for hearing. On December 9, 1987, the Board filed an answer to the petition and on December 11, 1987, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

After notice to all parties, a prehearing conference was held on January 4, 1988 before Ward R. Young, ALJ, at which time the hearing was scheduled for March 15 and 16, 1988. The matter was rescheduled to the undersigned for March 15 and 16 but adjourned at the request of the attorney for respondent. The matter was rescheduled for May 12 and 13, 1988. The hearing was completed May 12 and the record was held open to allow the parties to submit briefs.

The issues to be decided at hearing as set forth in the prehearing order are as follows:

1. Was the action of the superintendent of schools in the imposition of an "out of school" suspension, and subsequent determination of the Board to provide an equivalent educational program through home instruction or attendance at the Board's Adult Learning Center lawful?

2. Since petitioner elected home instruction, has the Board fulfilled its lawful responsibility in providing same?

3. Shall all records referring to V.M.'s suspension be expunged from his personal file?

POSITION OF THE PARTIES

Petitioners argue that V.M. was suspended for a long period of time without the required procedural due process. Because of this, they urge that the suspension be

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declared invalid and expunged from V.M.'s records. They further request that V.M. be given an equivalent education to make up for that which he lost by being barred from school.

The Board argues that V.M. was given every required opportunity for hearing and that on October 14, 1987 the Board ordered that he be reinstated and placed on home instruction at his request. It further argues that since he received home instruction, there is no need to provide remedial instruction and that because the suspension was a valid one imposed in accord with the proper procedural rules, the record of the suspension should not be expunged from V.M.'s school records.

STIPULATIONS OF FACT

At the time of hearing, certain facts were stipulated between the parties and placed upon the record. The following is taken verbatim from the transcript of hearing:

V.M., who is a 17-year-old minor, is a student in respondent school district Memorial High School. He resides with his parents...in West New York, New Jersey.

On or about August 20, 1987, V.M. and another minor committed an act of juvenile delinquency by breaking into Memorial High School and appropriating school equipment, as well as doing damage to the school's audiovisual room.

On or about October 23, 1987, before the Honorable J. T. O'Halloran, Superior Court Judge of New Jersey, Chancery Division, Family Part, V.M. pled guilty to juvenile delinquency, was placed on probation until his 18th birthday and agreed to pay restitution of $1,860.

Due to the August 20, 1987 incident, V.M. received an "out of school" suspension by Robert VanZanten, principal of Memorial High School, September 10, 1987--the first day of school for the 1987-1988 term. No formal suspension hearing was held at that time. The informal hearing was conducted by the superintendent [Carl Raparelli] on September 22, 1987.

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On or about October 1, 1987, a letter was sent to Mr. Raparelli by V.M.'s attorney requesting V.M. be placed on immediate home instruction. Mr. Raparelli responded and invited V.M., his attorney and his parents to attend a meeting of the Board.

On the evening of October 14, 1987, V.M. and his attorney came to the respondent's Board meeting to meet with the board regarding V.M.'s status. They, along with V.M.'s father and sister, were met by Mr. Raparelli, Joseph Ferrara, Esq., respondent's attorney, and Mr. VanZanten. V.M. was advised he could either go on home instruction or attend respondent's Adult Education School. V.M. demanded to be placed on home instruction as part of his suspension.

No action was taken by respondent Board at its October 14, 1987 meeting regarding V.M., except as to the acceptance of restitution monies from V.M. and the other minor.

On or about January 5, 1988, V.M. was advised by Mr. Raparelli that he could return to classes at Memorial High School for his midterms and return to his full schedule on January 27, 1988.

REVIEW OF TESTIMONY

C.M. testified on behalf of her son, V.M. She first learned of V.M.'s suspension when V.M. called from school on the first day of the term to tell her. She received formal notification in a letter dated September 10, 1987 from Anthony Yankovitch, the director of student affairs. The letter advised her of an informal hearing before the superintendent of schools, Carl Raparelli, scheduled for Tuesday, September 22 at 10:00 a.m. at the Board office. At the informal hearing, V.M. admitted the acts. Raparelli told the boys involved and their parents that they were required to make restitution and that the boys would remain on suspension until the next Board meeting on October 14, 1987, when the Board would decide what sanctions would be imposed.

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According to C.M., Raparelli denied her request to attend the Board meeting but invited her to report to Yankovitch's office at 10:00 a.m. on the morning after the Board meeting to receive the decision. Ultimately, F.M. and V.M. did attend the October 14, 1987 Board meeting with Eric M. Bernstein, Esq., their attorney. C.M. was out of town at the time of the meeting. The Board did not allow V.M. to return to school but recommended that he attend the Adult Learning Center. C.M. declined this offer because she felt that once V.M. left school, he would not complete his degree. To avoid this, the family requested home tutoring at least until it was decided what disciplinary action would be taken against him.

C.M. stated that V.M. did not receive home instruction until early in November. A tutor came to the home, left the assignments and came back to pick them up about a week later. Home instruction continued until V.M. returned to school in January following the holiday recess.

Carl Raparelli testified that he did not discourage F.M. and C.M. from attending the Board meeting but explained that they could either attend the meeting or call him the following morning for the Board's decision. Raparelli stated that the meeting of October 14, 1987 was the next regularly scheduled meeting of the Board. On October 14, the Board decided in caucus not to hear the case formally and instructed Raparelli to speak to the boys involved and their parents and take care of the matter. Raparelli was to reinstate V.M. in school by providing him with home instruction or by offering to place him in the Adult Learning Center, an alternative institution for disruptive or disaffected students. The alternative education program provides the same course of instruction given in Memorial High School. Any credits earned in the Learning Center may be used toward high school graduation requirements. F.M. and C.M. refused this alternative, and V.M. was enrolled in the home instruction program on October 20 or 21, 1987. On January 5, 1988, Raparelli sent a letter to V.M. offering him a choice of returning to classes at Memorial High School to prepare for midterm examinations beginning on January 20, 1988 or completing his examinations while remaining on home instruction. He was further informed that on January 27, 1988, he could resume his assigned schedule at the high school.

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According to the superintendent, the correct procedure was followed in the above matter. It is Board policy that a principal has the right to suspend disruptive pupils for two or three days before reporting the suspension to the superintendent of schools. The superintendent may, if necessary, conduct an informal hearing and, if a suspension is to continue, the matter must be reported to the Board of Education by its next regularly scheduled meeting.

Raparelli stated that students may be placed on home instruction because of behavioral problems, because the child study team recommends home study to meet their medical or behavioral needs or because they are ill and cannot attend classes. V.M. was therefore eligible for home study. Placement on home instruction is considered to be reinstatement since a suspended student would receive no educational services whatsoever.

DISCUSSION AND FINDINGS OF FACT

V.M. was suspended on September 10, 1987. An informal hearing before Raparelli was conducted on September 22, 1987. I **FIND** that a period of 12 days elapsed between the initial suspension and the informal hearing before the superintendent. I further **FIND** that the superintendent referred the matter to the Board of Education before its next regularly scheduled meeting.

I **FIND** that the Board of Education reinstated V.M. on October 14, 1987 and instructed Raparelli to advise petitioners that V.M. could elect to receive home instruction or instruction at the Adult Learning Center, the alternative learning program. C.M. notified Raparelli that V.M. elected to receive home instruction. I **FIND** that V.M. was enrolled in the home instruction program on October 20 or 21, 1987 and that home instruction was provided to him in early November 1987.

I **FIND** that there is no evidence that the home instruction provided by the district caused V.M. to fall behind in his class or to receive any other injury. C.M. testified only that the instruction provided did not appear to her to be adequate. There is

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no evidence to show that there was any effect upon his grades or his ability to comprehend the material presented.

DISCUSSION OF LAW AND CONCLUSIONS

A. Due Process:

The petitioner argue that V.M.'s due process rights have been violated.

N.J.S.A. 18A:37-2f provides for the suspension or expulsion of any student guilty of willfully causing or attempting to cause substantial damage to school property. The student may be suspended in accord with N.J.S.A. 18A:37-4:

> 18A:37-4 Suspension of pupils by teacher or principal.
>
> The teacher in a school having but one teacher or the principal in all other cases may suspend any pupil from school for good cause but such suspension shall be reported forthwith by the teacher or principal so doing to the superintendent of schools of the district if there be one. The superintendent to whom a suspension is reported or if there be no superintendent in the district, the teacher or principal suspending the pupil shall report the suspension to the board of education of the district at its next regular meeting. Such teacher, principal or superintendent may reinstate the pupil prior to the second regular meeting of the board of education of the district held after such suspension unless the board shall reinstate the pupil at such first regular meeting.

N.J.S.A. 18A:37-5 governs the continuation of suspension, reinstatement or expulsion of the student:

> 18A:37-5. Continuation of suspension; reinstatement or expulsion
>
> No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board.

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In the present matter, the facts show that the V.M. was suspended on September 10, 1987, the first day of school. N.J.S.A. 18A:37-5 requires that the suspension be reported "forthwith to the superintendent of the district." The record does not indicate the actual date on which the suspension was reported, but the superintendent, Raparelli, conducted an informal hearing of the matter on September 22, 1987. The meeting was attended by C.M., V.M., the other boy involved in the incident and his mother, Raparelli, VanZanten, the principal of Memorial High School, and Yankovitch, the director of student affairs. At that time, V.M. admitted committing the offense and he and his mother were told that he would remain on suspension until the next Board meeting on October 14, 1987 in accord with N.J.S.A. 18A:37-4.

Petitioners cite Goss v. Lopez, 419 U.S. 565 (1975) in arguing that V.M. was deprived of his due process rights in the continuation of the suspension. In particular, they refer to the lack of counsel for V.M. at the September 22, 1987 hearing, the fact that no witnesses were present that could be cross-examined by V.M. and the failure of the school to advise V.M. of the consequences of any admission of wrongdoing on his part. This reliance on Goss is misplaced. Goss requires only that, in connection with suspensions of ten days or less, the student be given oral or written notice of the charges against him. The majority opinion at p. 583 notes that in most cases it is sufficent to have the disciplinarian informally discuss the alleged misconduct with the student right after it occurs. Only if the student denies the charges need he be given an explanation of the evidence the authority has against him and an opportunity to present his side of the story.

Applying Goss to the present case, it is clear that there was no need to provide V.M. with written notice of the charges against him since he had been arrested and formally charged with a criminal offense at the time of the incident in August. If the statement of charges was sufficient to satisfy the courts, it should certainly have been sufficient to satisfy the requirements of the administrative proceeding in the school. Since V.M. admitted his conduct at the informal hearing, there was no reason to explain the evidence the authorities had or to give V.M. the opportunity to present his side of the story, nor was there any need to bring witnesses to confront V.M. and to give him the opportunity to cross-examine them. Petitioner cannot extend Goss to provide to V.M. the right to a kind of Miranda warning so as to invalidate any admissions made by him to the

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superintendent. Nowhere does Goss require the presence of counsel at the informal hearing. Consequently, I **FIND** that V.M.'s rights were not violated when Raparelli continued his suspension to the time of the Board meeting of October 14, 1987.

The same considerations in regard to violation of V.M.'s due process rights apply to the October 14, 1987 hearing before the Board. Petitioners recite a list of standards required for a full formal hearing as set forth in R.R. v. Board of Education of the Shore Regional High School District, 109 N.J. Super. 337 (Chan. Div. 1970). The list is irrelevant. V.M. was represented by counsel at the October 14, 1987 Board meeting. There was no need for the other requirements of formal hearings since V.M. admitted to the acts complained of.

Petitioners contend that the Board's failure to act subsequent to the October 14, 1987 meeting was a violation of the statutorily required procedure. I **FIND** that N.J.S.A. 18A:37-5 does not require board action in this case since, contrary to petitioners' assertion, the suspension of V.M. was not continued past the October 14, 1987 Board meeting. The Board reinstated V.M. and offered to provide educational services in the form of either home instruction or instruction at the Adult Learning Center.

Based upon the above, I **CONCLUDE** that no significant procedural due process rights of V.M. were violated either at the informal hearing of September 10, 1987 or at the Board meeting of October 14, 1987. If there were minor breaches due to the time intervals elapsed, they were not the cause of any injury to V.M.; under the statutes, V.M. could have been and was suspended for the offense he admitted committing. Therefore, V.M.'s suspension from September 10, 1987 to October 14, 1987 was appropriate and consistent with the law. "Delay will not, generally, affect the validity of administrative decisions." In re Darcy, 114 N.J. Super. 454, 462 (App. Div. 1971). Petitioners were entitled to due notice and hearing. If they were not, in fact, afforded these, their remedy is to be granted a hearing. Jones v. Dept. of Civil Service, 118 N.J. Super. 323 (App. Div. 1972). I therefore further **CONCLUDE** that if any violations of V.M.'s procedural due process rights were committed in regard to the hearings of September 10, 1987 and October 14, 1987 they are cured by the present hearing before the undersigned.

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B. The Board's Reinstatement Action:

The next question is whether home instruction or attendance at the Board's Adult Learning Center was appropriate reinstatement under the circumstances. A student's access to school buildings may be restricted if there is reason to believe that his presence constitutes a threat to the safety of school property. State v. Conk, 180 N.J. Super. 140 (App. Div. 1981). Under the rationale of Conk, a school board has the ability to suspend a student completely for the destruction or taking of school property. By extension it therefore has the authority to limit a student's access to school grounds for behavior for which it had the right to suspend him. The Board was allowed under N.J.S.A. 18A:37-2f to suspend V.M. for these acts, and I **FIND** that it would have been within their discretion to impose this penalty. The Board chose instead to reinstate him but restricted his access to the school buildings until he made restitution for the property of which he deprived the school. A student 16 or 17 years of age may attend an adult education program if his attendance is approved by his parents and the superintendent of schools, See, N.J.A.C. 6:30-1.2(b). Therefore, I **FIND** that it was lawful and properly within the discretion of the school Board to offer V.M. the choice of home instruction or attendance at the alternative learning program. A student's right to an education is subject to the student's adherence to lawful conditions. State v. Conk.

I **CONCLUDE** that the Board fulfilled its responsibility in providing home instruction to V.M. V.M. requested to be placed on home instruction on October 1, 1987 while he was still under suspension and it was appropriately not provided at that time. He was enrolled in a home instruction program on October 20 or 21, 1987 but instruction did not begin until early November. There is no evidence in the record that V.M.'s studies suffered because of the instruction provided. There is no testimony that he did not do well on his examinations or that he was not promoted or failed to graduate with his class. I therefore further **CONCLUDE** that V.M. is not entitled to equivalent education.

C. Expungement:

The final issue is whether all trace of the suspension should be expunged from

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V.M.'s school's records. The following is the applicable regulation:

> N.J.A.C. 6:3-2.7 Rights of appeal for parents and adult pupils
>
> (a) Pupil records are subject to challenge by parents and adult pupils on grounds of inaccuracy, irrelevancy, impermissive disclosure, inclusion of improper information or denial of access to organizations, agencies and persons. The parent or adult pupil may seek to:
>
> 1. Expunge inaccurate, irrelevant or otherwise improper information from the pupil record;
>
> 2. Insert additional data as well as reasonable comments as to the meaning and/or accuracy of the records; and/or
>
> 3. Request an immediate stay of disclosure pending final determination of the challenge procedure as described in this subchapter.
>
> ...
>
> (d) Regardless of the outcome of any appeal, a parent or adult pupil shall be permitted to place a statement in the pupil record commenting upon the information in the pupil record or setting forth any reasons for disagreement with the decision of the agency. Such statements shall be maintained as part of the pupil record as long as the contested portion of the record is maintained. If the contested portion of the record is disclosed to any party, the statement commenting upon the information must also be disclosed to that party.

The record of V.M.'s suspension is not subject to challenge by his parents on the basis of any of the grounds listed. It is not inaccurate, irrelevant or improper. It is the true report of a justified suspension imposed upon V.M. for the self-confessed acts of taking and/or destroying school property. Consequently, I **CONCLUDE** that C.M. and F.M. are not entitled to have this information expunged from V.M.'s record. They do, however, have the right under the regulations to insert additional data and reasonable comments as to the meaning and/or accuracy of the record and to place a statement in the record in accord with N.J.A.C. 6:3-2.7(d).

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ORDER

Accordingly, based upon the above it is **ORDERED** that the suspension of V.M. from September 10, 1987 to October 14, 1987 should be and hereby is **AFFIRMED** and the request to have V.M.'s suspension expunged from his school records should be and hereby is **DENIED.** It is further **ORDERED** that the request for equivalent education should be and hereby is **DENIED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

August 8, 1988
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

August 9, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 10 1988
DATE
PAR/e

FOR OFFICE OF ADMINISTRATIVE LAW

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F.M. AND C.M., on behalf of their son, V.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record of this matter which includes the transcript of the testimony of the witnesses adduced at the hearing conducted on May 12, 1988, the Commissioner does not agree with the ALJ's findings and conclusions which hold that no significant due process rights of V.M. were violated as the result of his suspension from school commencing on September 10, 1987. In the Commissioner's judgment, the undisputed facts contained in the record of this matter clearly establish the following.

The Board failed to comply with the mandated criteria enunciated by the court in R.R. v. Shore Regional, supra, which holds that a local board of education is required to conduct a formal due process hearing within twenty-one days of a pupil suspension in order to comply with due process requirements affecting pupil suspensions or expulsions pursuant to provisions of N.J.S.A. 18A:37-4 and 5.

In this case the Board meeting pertaining to V.M.'s suspension was not held until October 14, 1987, thirty-four days after V.M. was suspended from school.

Moreover, it is stipulated that no action was taken by the Board affecting V.M. at the time of the October 14 meeting other than to accept restitution of monies from V.M. and another minor. Further support of the Board's failure to take appropriate action to conduct a formal hearing for V.M. or to further determine what penalty, if any, would be imposed upon him is contained in the direct testimony of Superintendent Raparelli when queried by Board counsel:

> Q And when you were talking about the answer, were you talking about whether the Board of Education would take up the matter further or remand it to you?

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> A Well, that is the Board's decision. When I reported it to the Board, the incident officially on October, I think the date was the 14th, on October 14th, the Board of Education then decided, in caucus, not to hear the case and instructed myself to go out and speak with V., and his, I believe, his father and, I believe his sister was there, and Mr. Bernstein.
>
> The Board told me to handle the case under the usual procedure, in accordance with what we always do in an attempt to reinstate the student into a program, of either home instruction or the alternate education program. (Tr. 26-29)

It must also be noted at this juncture that the court hearing involving V.M., in which he pleaded guilty to juvenile delinquency, was not decided until October 23, 1987.

The Commissioner in this regard cannot accept the Board's argument or the finding of the ALJ which holds that a formal due process hearing before the Board was not required as mandated in R.R., supra, because V.M. had previously admitted his guilt to the school authorities. This is so regardless of whether V.M. previously admitted his guilt to the school administrators or that he subsequently pleaded guilty to the charges against him in court. The Board was required to afford V.M. a due process hearing in order to arrive at a determination as to the gravity of V.M.'s disciplinary infraction and to further determine whether V.M.'s behavior warranted a continued long-term suspension or expulsion from school. Consequently, the Board's failure to conduct a formal R.R. type suspension or expulsion hearing was a violation of V.M.'s lawful due process rights.

Moreover, the Board also erred in delegating its responsibility to arrive at a decision affecting V.M.'s future status in a regular school program to the Superintendent.

Consequently, the Commissioner finds and determines that without having conducted a formal suspension or expulsion hearing in the instant matter, the Board illegally allowed the Superintendent to continue V.M.'s exclusion from regular school attendance until January 27, 1988.

More importantly, it must be noted that the home instruction provided to V.M. during the period of time he was excluded from regular school attendance was without authority in law under the circumstances set forth herein. Home instruction may only be provided to pupils who have been classified by the child study team and recommended for such instruction pursuant to N.J.A.C. 6:28-4.2(b)(5).

The Commissioner further finds and determines that the second option offered to V.M. to attend classes at the adult school in lieu of attending his regular classes is impermissible absent

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formal Board action to expel V.M. as the result of a formal R.R. type hearing.

In conclusion, the Commissioner finds and determines that V.M.'s suspension from school beyond the twenty-one day period constituted a long-term suspension from school which is deemed to be ultra vires absent a formal due process hearing afforded to him by the Board. To the extent that the findings and conclusions reached by the ALJ in the initial decision hold to the contrary, they are hereby reversed.

However, inasmuch as there is no evidence in the record to establish that V.M. was adversely affected by the Board's action to the extent that he was unable to achieve passing grades for the courses he took during the 1987-88 school year, there is no further relief to be offered by the Commissioner.

Accordingly, to the extent that the remaining findings and conclusions in the initial decision are not inconsistent with the above finding and determination, they are affirmed herein.

The Commissioner hereby directs the Board to revise its policies and procedures pertaining to future long-term pupil suspensions (N.J.S.A. 18A:37-4) in conformity with this decision and with those due process procedures mandated in R.R. v. Shore Regional, supra.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 20, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1301-88
AGENCY DKT. NO. 35-3/88

FRANK J. EDWING,
Petitioner,
v.
BOARD OF EDUCATION
OF THE VILLAGE OF RIDGEFIELD PARK,
Respondent.

Gerald R. Salerno, Esq. for petitioner
(Aronsohn, Springstead & Weiner, attorneys)

Frank N. D'Ambra, Esq. for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: June 23, 1988 Decided: August 8, 1988

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a proceeding instituted by a former school custodian who contends that the manner of his dismissal from public employment violated his rights under the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.*, popularly known as the "Sunshine Law." The only issue is whether respondent board of education complied with the

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requirements of the Act. Specifically, petitioner alleges that he did not receive adequate notice of his proposed dismissal and that the board action was not taken in public.

Procedural History

Petitioner Frank J. Edwing ("Edwing") had originally filed a complaint for similar relief on November 12, 1987 in the Superior Court, Law Division, Bergen County. However, on January 12, 1988 Superior Court Judge Peter F. Boggia entered an order dismissing the complaint without prejudice and directing that the matter be transferred to the Commissioner of Education ("Commissioner") "for further disposition." On March 14, 1988, Edwing filed a verified petition with the Commissioner of Education. Respondent Ridgefield Park Board of Education ("Board") filed its answer on March 28, 1988. Subsequently, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

On May 6, 1988, the Board filed a motion for summary decision, together with a brief and supporting affidavit. One month later, Edwing filed an opposing brief and affidavit. Rather than decide the case on the basis of the affidavits alone, the OAL proceeded to take limited testimony at a hearing on June 14, 1988. The record closed on June 23, 1988 upon submission of additional papers.

Findings of Fact

All of the material facts are undisputed. From the proofs presented at the hearing, I **FIND**:

Edwing, who began work in the district in September 1986, was employed for a one-year term as a school custodian. It is conceded that he did not acquire any tenure in his position. As a result of an unrelated arbitration award, the Board was ordered to reinstate another school custodian who had been previously discharged. Charles Juris, superintendent of schools, notified Edwing in writing on September 30, 1987 that he would recommend termination of Edwing's employment to make room for the returning custodian.

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That same evening of September 30, 1987, the Board held a regularly scheduled meeting which had been advertised as a "workshop session." At its organization meeting held on April 15, 1987, the Board had fixed the date, time and place for its monthly workshop sessions and had arranged for publication in two local newspapers. Although Edwing was aware that the Board might be considering his employment status on September 30, 1987, he did not attend the meeting. Present in the audience at the meeting, however, were various observers, including his mother and father, as well as a reporter from a newspaper. The topic of Edwing's termination had been added to the printed agenda for the meeting. Edwing's mother, Fran Davison, sought unsuccessfully to address the Board before it voted on her son's employment, but she was not allowed to speak. There was no opportunity for public discussion at any time during the meeting. Mrs. Davison suggested at one point that the Board go into closed session to consider personnel matters, but the Board conducted its entire deliberations in public. The vote took place in full view of the public, with little or no prior discussion on the part of the Board members. By vote of 7 to 2, the Board adopted a resolution terminating Edwing's employment on 30 days notice.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioner has not sustained his burden of proving a violation of the Sunshine Law.

At the outset, it should be noted that the petition was filed with the Commissioner more than five months after the board action sought to be reviewed. As such, the pleading is clearly untimely under *N.J.A.C.* 6:24-1.3, which requires a petitioner to file a petition "no later than the 90th day from the date of receipt of a final order, ruling or other action by the district board of education [.]" *Riely v. Hunterdon Cent. High Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980). Nonetheless, respondent failed to identify this issue as an affirmative defense and, at the prehearing conference, expressly waived all defenses relating to the timeliness of the filing of the petition. Both sides urge that this case be decided on its merits.

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As indicated, Edwing does not claim any statutory tenure rights under *N.J.S.A.* 18A:17-3, which protection is limited to custodians who, unlike Mr. Edwing, are appointed for other than a fixed term. Nor does he assert any contractual tenure claim under the doctrine of *Wright v East Orange Bd. of Educ.*, 99 *N.J.* 112 (1985). His claim is based solely on his rights under the Sunshine Law.

The Sunshine Law, *N.J.S.A.* 10:4-6 *et seq.*, is an expression of the "strong tradition" in this State "favoring public involvement in almost every aspect of government." *Polillo v. Deane*, 74 *N.J.* 562, 569 (1977). Its purposes include fostering a "government of the people" and preventing "corruption which thrives in secret places[.]" *Polillo*, at 571. Generally, all meetings held by public bodies, including boards of education, must be open to the public, unless the subject matter falls within one of several narrowly construed categories. *N.J.S.A.* 10:4-12. In addition, the Sunshine Law includes certain notice requirements to insure that the public has a meaningful opportunity to attend such meetings.

First, Edwing complains that the Board's action is invalid due to lack of proper notice of its meeting. Actually, there are two types of notice requirements under the Sunshine Law, those pertaining to "annual notice" and those pertaining to "48-hour notice." With respect to "annual notice," *N.J.S.A.* 10:4-18 requires that "once each year, within 7 days following the annual organization or reorganization meeting" a public body must publicize "a schedule of the regular meetings . . . to be held during the succeeding year" by posting a copy in a prominent public place, mailing a copy to at least two newspapers in its area of jurisdiction and filing a copy with the municipal clerk. Such notice shall contain "the location of each meeting to the extent it is known, and the time and date of each meeting." *Ibid.* Here the Board submitted a copy of a resolution establishing that it has complied with this "annual notice" requirement and Edwing has failed to introduce any proofs showing otherwise.

A separate section of the Sunshine Law, *N.J.S.A.* 10:4-8(d) provides that "adequate notice" constitutes "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, agenda" of any meeting. Again such notice must be effected by posting in a prominent place, delivery to two newspapers and filing with the municipal clerk. Significantly, *N.J.S.A.* 10:4-8(d) also provides that "[w]here annual notice . . . in compliance with section 13 of this act

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[N.J.S.A. 10:4-18] sets forth the location of any meeting, no further notice shall be required for such meeting." It is well settled that the 48-hour notice is necessary only where no annual notice at all was given or where an annual notice left out the location or was in some way defective. *Witt v. Gloucester Cty. Bd. of Chosen Freeholders*, 94 *N.J.* 422,432 (1983); *Donato v. Gibson*, 178 *N.J. Super.* 163, 169-70 (App. Div. 1981). Once annual notice has been given in accordance with *N.J.S.A.* 10:4-18, the public body has met the mandate of the Sunshine Law. *Crifasi v. Governing Body of Oakland*, 156 *N.J. Super.* 182, 186 (App. Div. 1978).

Edwing relies on *Rice v. Union Cty. Reg. High Sch. Bd. of Ed.*, 155 *N.J. Super.* 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978), the circumstances of which are readily distinguishable. *Rice* dealt with a situation where the board of education convened in closed session to discuss personnel matters and the affected individuals were denied any opportunity to exercise their statutory right to demand that the discussions occur in public. In that context, the Appellate Division held that those who are potential targets for job termination are entitled to reasonable notice from the board. Unlike the teachers in *Rice* who received no warning whatsoever, Edwing did receive advance notice, albeit on the same date that the meeting itself took place. More importantly, in *Rice* it was the board which wanted the closed meeting and the teachers who wanted the public meeting. Thus, the case stands for vindication of the policy of openness which the Sunshine Law was enacted to promote. *Polillo, supra*. In the present case, the roles are completely reversed. It is the Board which chose to conduct its business in public and Edwing, or his mother, who asked for discussions in private. Policy considerations underlying the Sunshine Law which favored the teachers in *Rice* cut the opposite way in this case. In any event, any right to privacy which Ewing may possess is personal to him alone and cannot be invoked on his behalf by his mother. *Rice*, at 74-75. *See also, Oliveri v. Carlstadt-E. Rutherford Bd. of Educ.*, 160 *N.J. Super.* 131 (App. Div. 1978).

Finally, Edwing argues that he was deprived of a "public" discussion. While the basis for this contention is somewhat obscure, it apparently rests on the fact that his mother was not allowed to speak and the Board members themselves did not discuss the proposal before voting. All that the Sunshine Law safeguards is "the right of the public *to be present* at all meetings of public bodies, and *to witness* in full detail all phases of the deliberation, policy formulation and decision making of public bodies[.]" (Emphasis added.) *N.J.S.A.* 10:4-7. "Nothing in this act shall be construed

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to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting." *N.J.S.A.* 10:4-12. A "public discussion" in this sense is not an evidentiary hearing with the right to specification of charges, to cross-examine and to other procedural safeguards. *Jamison v. Morris Sch. Dist. Bd. of Educ.*, 198 *N.J. Super.* 411, 415 (App. Div. 1985).

Undoubtedly it would have been preferable for the Board to have listened to what Edwing's mother had to say, even though it was not legally obligated to do so. *See, Donaldson v. No. Wildwood Bd. of Educ.*, 65 *N.J.* 236, 246 (1974) (timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken). Yet the Board's lack of courtesy does not rise to the level of a violation of the Sunshine Law. Similarly, the Board's action cannot be voided simply because its members did not debate the question before taking a vote. What those in attendance saw was the manner in which the Board conducted its deliberations. The Sunshine Law does not require more.

Order

It is **ORDERED** that petitioner's request for relief is denied.

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This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN,** for consideration.

Aug. 8, 1988
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

8/8/88
DATE

Receipt:
Seymour Weiss
DEPARTMENT OF EDUCATION

AUG 11 1988
DATE

Mailed ~~to Parties~~:
Ronald J. Parker/K.S
FOR OFFICE OF ADMINISTRATIVE LAW

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FRANK J. EDWING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were not filed within the time prescribed by N.J.A.C. 1:1-18.4.

Upon review of the record in this matter, the Commissioner is in agreement with the ALJ's recommended decision to dismiss the Petition of Appeal for failure to sustain the burden of proving a violation of the Open Public Meetings Act (OPMA). The record is clear that annual notice of the Board's regularly scheduled meetings was provided in accordance with N.J.S.A. 10:4-18 for both the regular monthly public meetings and monthly workshop sessions (P-3). N.J.S.A. 10:4-18(d) provides that no further notice is required for meetings where annual notice has been given, a point which has been repeatedly affirmed by the courts. Witt, supra; Crifasi, supra; Alan Schwartz v. Board of Education of Ridgefield 1980 S.L.D. 310, rev'd State Board 332, aff'd N.J. Superior Court, Appellate Division, November 2, 1981, A-740-80-T1 Moreover, in Crifasi, the Appellate Court specifically held that action taken by a governing body at a regularly scheduled workshop session for which annual notice was provided does not require any further notice as dictated by N.J.S.A. 10:4-8(d). Moreover, the Commissioner agrees with the ALJ's determination that the decision in Rice, supra, does not serve as support that the Board's action was improper in this matter.

Accordingly, for the reasons expressed in the initial decision, the findings, conclusions, and recommended order of the ALJ are adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 20, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1535-88
AGENCY DKT. NO. 29-2/88

CHRISTEL COMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., **for petitioner** (Klausner, Hunter & Oxfeld, attorneys)

David B. Rubin, Esq., **for respondent** (Rubin, Rubin & Malgran, attorneys)

Record Closed: June 29, 1988 Decided: August 12, 1988

BEFORE JOSEPH LAVERY, ALJ:

This is an appeal by **Christel Coman (petitioner)** a former certified teacher with the **respondent Board of Education, Township of East Brunswick (Board)**. Originally, petitioner sought: (a) adjudication that she had attained tenure as a teacher of special education, (b) immediate reemployment by respondent in that capacity, (c) back pay, accrued benefits or other relief as appropriate, and (d) a finding that the Board's actions surrounding its denial of tenure were arbitrary, capricious, and unreasonable. Since initiating the verified petition, however, petitioner has abandoned her claim of having attained tenure.

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PROCEDURAL HISTORY

After timely appeal the **Commissioner of Education** declared this matter a contested case pursuant to N.J.S.A. 52:14B-9 and 10. He filed it in the **Office of Administrative Law (OAL)** on March 10, 1988. Thereafter, the Acting Director and Chief Administrative Law Judge, pursuant to N.J.S.A. 52:14F-5n, assigned the case for disposition. Prehearing conference convened on April 14, 1988 and the matter was scheduled for plenary hearing on June 15 and June 16, 1988. A motion to dismiss was brought by respondent Board, opposed by petitioner, and resolved at the first day of hearing on June 15, 1988, in the North Brunswick Municipal Building through substitution of the pending motion and cross-motion for summary decision, decided today. Briefs followed, the last of which was filed, together with a stipulation of facts, on **June 29, 1988**. On that day the record closed.

ISSUES

Since petitioner has withdrawn her claim that tenure has attached, the sole issues remaining for determination, specified at the plenary hearing, which was converted to conference, on June 15, 1988, are:

1. Whether or not the verified petition was timely filed, and

2. Whether or not the Board's denial of tenure was arbitrary, capricious, or unreasonable.

UNDISPUTED FACTS:

The facts on which respondents bring their motion have been compiled in a stipulation attached to respondent's letter brief, and filed June 29, 1988. Those stipulations are reprinted below:

1. Christel Coman was initially hired by the respondent as a special education teacher/resource room effective January 14, 1985 through June 30, 1985 (J-1A).

2. Subsequently, the petitioner reached an agreement with the respondent that her first day of employment would actually be February 4, 1985 (J-13, J-2, pp. 1-3).

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3. Petitioner's employment for the 1985-86 school year was approved by the respondent on June 12, 1985 (J-1C) (See also Professional Educator's Contract for September 1, 1985 to June 30, 1986, J-2, p. 4). On June 19, 1985, the respondent approved petitioner's employment for a summer workshop to revise curricumul guides and course proficiencies for junior high students requiring modified programs (J-1D).

4. On March 26, 1986, the respondent approved the employment of the petitioner "for the 1986-87 school year" (J-1E). On that date, the respondent also specifically listed non-tenured employees who were not recommended for re-employment for the 1986-87 school year (J-1E, p. 3). (See also Professional Educator's Contracts for September 1, 1986 to June 30, 1987, J-2, pp. 5, 6 and 7.)

5. In March, 1987, the respondent voted not to reemploy petitioner for the 1987-88 school year (J-1F). At that time, petitioner did not request a statement of reasons or an informal appearance before the respondent.

6. On June 11, 1987 the respondent approved petitioner's re-employment for the 1987-88 school year with the following notation:

   "(9/1/87-12/6/87-60 days notice." (J-1G)

   On that same date, the respondent approved petitioner's employment for summer school 1987 (J-1H). (See also Letter of Intent dated June 15, 1987, J-2, p. 8.) At that time, petitioner did not request a statement of reasons or an informal appearance.

7. On October 22, 1987, the respondent approved petitioner's employment as a home tutor for the 1987-88 school year (J-1I).

8. On November 16, 1987, the petitioner received a memorandum from Philip S. Houser, Principal of Hammarskjold Middle School (J-4), indicating that he had scheduled a meeting to discuss the status of her employment. At that meeting, Mr. Houser stated to the petitioner three reasons why he was not recommending tenure (J-6). This meeting was the first time that petitioner was specifically advised by her building

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principal as to the reasons why the administrative team was not recommending tenure.

9. On November 17, 1987, petitioner was sent a letter indicating that on November 19, 1987, the respondent would be discussing her employment status in closed sess ion (J-5).

10. At that time, the petitioner had a meeting with Dr. Joseph Sweeney, Superintendent of Schools, discussing the recommendation that Mr. Houser had indicated to her he was making for her not to receive tenure. As a result of the petitioner's meeting with Dr. Sweeney, on November 16, 1987, the respondent re-appointed petitioner for employment effective November 20, 1987 through January 19, 1988 (J-1J).

11. In December, 1987, the petitioner received a memorandum from Houser enclosing a memorandum dated November 20, 1987 notifying the petitioner of her re-employment through January 19, 1988 (J-8).

12. On December 11, 1987, the petitioner requested the reasons for her non-re-employment (J-9). Petitioner was notified of those reasons by memorandum dated December 22, 1987 (J-10).

13. Petitioner did not request a hearing before the respondent after receiving the notice of reasons for non-re-employment.

14. At its meeting of February 4, 1988, the respondent hired Eve Kossower to replace the petitioner (J-11).

15. Each spring, the respondent reviews the employment situation of each non-tenured employee.

16. If any non-tenured employees would acquire tenure after January 1st of the subsequent school year, the respondent will not approve such individual's employment for the entire next year. Instead, the respondent would either: (a) not renew the contract of employment at all or (b) re-appoint an individual for the following school year through a date 60 days prior to the date on which the employee would receive

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tenure denoted in the Board meeting minutes as "60 day notice." (See also exhibit J-12.)

17. The respondent contends that the reason for such approvals is to afford the employee and the respondent additional time to re-evaluate each such individual's employment during the subsequent school year as an alternative to immediate non-renewal.

It is on these stipulations that both parties ground their motion and cross-motion for summary decision.

ARGUMENTS OF THE PARTIES

Petitioner's Argument:

Petitioner agrees that only two issues remain, as outlined above, at page two. Addressing them in their order:

TIMELINESS OF APPEAL (90 DAY RULE):

Petitioner concedes that she became aware in June of 1987 that her employment was approved only until December 6, 1987. Nevertheless, she adds that she had not, at that time, received any notification of the ultimate decision on tenure, supported by progress reports and summary evaluations. The progress notes and evaluations which she had received, independent of the June decision of the Board, gave no indication that her performance had fallen so short as to require the denial of tenure. Consequently, she could only speculate that the Board had reached a determination. Only in November of 1987, at a conference with her school principal, Philip S. Houser, did she become aware that she was not to be recommended for tenure.

On November 19, 1987, the Board voted to continue her employment through January 19, 1988. However, it was not until December 9 that she received the November 20, 1987 memo (Exhibits J-8 and J-9) informing her that her employment with the Board would cease after this January cut-off. At that point, she wrote for a statement of reasons (Exhibit J-9).

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Under school law petitioner was entitled to investigate the cause of her disapproval. Even if the Board action of June 11, 1987 was to be presumed as notice, it was not clarified until the December memo. That was the first formal declaration that petitioner had received which would cause her to understand that she had not achieved tenure. Consequently her verified petition filed on February 17, 1988, was well within the 90-day filing requirement of N.J.A.C. 6: 24-1.2(b).

WHETHER THE BOARD'S PROCEDURE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE:

Petitioner contends that, since the Board has freely acknowledged its practice of awarding "short contracts" to accumulate reasons for denial of tenure, they have proceeded contrary to school law, more particularly N.J.S.A. 18A:27-3.2 and 3.3 as well as N.J.A.C.6:3-1.20. While there is discretion in the Board, it may not ignore the requirement that any determination not to grant tenure must be supported by reasons. The Board's admitted practice is unlawful as applied in the main, and as specifically followed in this case.

Respondent Board's Argument:

The Board's response may be considered in the same sequence as petitioner's discussion of the issues:

TIMELINESS OF APPEAL (THE 90-DAYRULE):

The Board contends that petitioner knew, or should have known, that within 90 days of June 11, 1987, when the Board made its decision to reemploy petitioner fromSeptember 1, 1987 to December 6, 1987, giving 60 days notice (Stipulation No. 6), she had to file an appeal, pursuant to N.J.A.C. 6:24-1.2. Here the petition was filed on February 17, 1988. This is the crucial legal fact.

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Most significant is the circumstance that the Board had no obligation to extend any continued employment to petitioner in June of 1987, or to extend petitioner's contract for any particular duration. Petitioner did not request in June of 1987 an explanation from the Board as to why she was denied a full year's contract. This "short contract" is really the crux of her appeal. Since she failed to challenge it within 90 days from its inception, the petition should be dismissed.

WHETHER THE BOARD'S PRACTICE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE

The Board insists that petitioner is in error when it suggests that the Board's practice of awarding contracts terminating 60 days short of a tenure accrual date is illegal. In its view, her argument that a "short contract" has the sole purpose of allowing fabrication of reasons to support tenure denial is "nonsensical". Even if one were to accept the dubious proposition that it must have "good cause" to deny tenure, the Board emphasizes that a rejected non-tenured teacher must request a statement of reasons for tenure denial, and ask to be heard before the Board. There is no affirmative duty to supply reasons or hearing without that request. Petitioner made no such moves when the Board voted not to renew her contract, in March of 1987. Neither did she make that effort when the Board awarded a "short contract" in June of 1987. Consequently, she now is without standing to challenge either act.

Moreover, nothing in the record supports the theory that a "short contract" is an unlawful device, used to deny tenure. There is no obligation on the Board to renew a contract at all. The Board's decision in March of 1987 terminated her relationship with the Board, effective the end of the 1986-87 school year. Its later decision in June of 1987 to extend her employment does not constitute a decision to deny tenure. It was merely an extension. The "short contract" practice permits both the nontenured employee and the school district an opportunity to work together before a decision is made and whether to award tenure. In November 1987 the Board's "Administrative Team" charged with evaluating petitioner's performance decided not to recommend tenure. On November 16, petitioner was advised of the reasons. The Board agreed with the staff's assessment, allowing only one more month of work to petitioner, which effectively denied tenure. The Board's policy of "one last look" over less than a year is not illegal. This argument is further flawed for the obvious reason that every non-tenured teacher's "form" contract contains a 60-day termination clause. Thus, even if the Board had voted on

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June 11, 1987, to award a full year's contract in 1987-88, the Board still could have terminated petitioner's employment 60 days short of the tenure accrual date. The Board's "short contract" is meant to be beneficial. It puts employees on fair notice of tenure denial, in a far more enlightening fashion.

Petitioner's present attempt to focus on the merits of her teaching evaluations, which underlie the Board's decision, is out of place, for the foregoing reasons. However, if these evaluations are to be seriously addressed, that must be accomplished through plenary hearing, not by the summary decision for which petitioner here moves.

ANALYSIS

This matter, brought on through motion and cross-motion for summary decision, pursuant to N.J.A.C. 1:1-12.5, is ripe for such determination. A stipulation of material facts, none of which are in dispute, allows such judgment under the rule, and in accord with Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954).

TIMELINESS OF APPEAL (90 DAY RULE):

Petitioner has satisfied the timeliness requirement of N.J.A.C. 6:24-1.2(b):

> **The petitioner shall file a petition no later than the 90th day from the date of receipf of the notice of a final order, ruling or other action by the District Board of Education which is the subject of the requested contested case hearing.**

The "final order, ruling, or other action" by the Board, it might well be thought, was the Board's March 1987 decision not to reemploy petitioner for the 1987-88 school year (Exhibit J-1F). However, what followed, by the Board's own concession, revived the relationship between it and petitioner. On June 11, 1987, the Board reemployed petitioner until December 6, 1987, albeit granting 60 days notice. However, it is the admitted policy of the Board to grant such "short contracts" to allow both parties "one last opportunity to work together before a decision is made on whether to award tenure. That is precisely what occurred here". (Resp. Br. p. 4, June 27, 1988). Further:

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The administrative recommendation not to award tenure incorporated petitioner's evaluations during the fall 1987 semester, supporting the Board's position that the purpose of this practice is to afford the parties "one last look'".

(Id, p.5)

The import of this new arrangement ("short contract" or no) is, that petitioner was once again inching toward tenure. The Board itself had given her yet another opportunity to win its approval. One could not reasonably expect her to challenge this practice in June, while her continued employment (and evaluation) offered a fragile opportunity to win favor by December. No reasonable person could be expected to jeopardize that chance. Not until November 16, 1987, did she learn from her school principal, Philip S. Hauser (Exh. J-4), that he would not recommend tenure, for the reasons stated (Exh. J-6). Yet, on November 19, 1987, the Board reappointed her until January 19, 1988. a gesture again fraught with hope of redemption. However, on December 22, any expectation of tenure should have ceased. At her request (Exh.J-9), petitioner was notified by memorandum of the reasons for non-reappointment after January 19, 1988 (Exh. J-10). At this point, petitioner should have understood with certainty that the Board's "one last look" had ended. In all fairness, the time for appeal should be measured from that point.

It is beyond cavil that the 90-day requirement of N.J.A.C. 6:24-1.2 is mandatory, and not a casual demand, North Plainfield Educ. Assoc'n v. Bd. of Educ., 96 N.J. 587 (1984). Yet, the rule is not to be applied without regard to circumstances. Neither is it to be employed as a trap for the unwary. The Board continued to leave open the possibility of employment past the tenure date. It rehired petitioner twice following its initial assessment in March of 1987 not to renew her full-year contract. The Board's own position is that the purpose of these rehirings was to allow further scrutiny of petitioner's work. It cannot now complain if petitioner brings an appeal from that assessment, finally made known to petitioner in the memo of December 22, 1987 (Exh. J-10).

WHETHER THE BOARD'S PROCEDURE
WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE

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Notwithstanding the timeliness of petitioner's appeal, she has not demonstrated that the Board's reliance on 'short contracts' is arbitrary, capricious, unreasonable or otherwise unlawful. The relevant case which she proffers, Donaldson v. Bd. of Educ. of No. Wildwood, 65 N.J. 236 (1974), focused on one issue: Whether or not a nontenured teacher was entitled to a statement of reasons for not being granted tenure. Taking congizance of that case, the Commissioner of Education promulgated N.J.A.C. 6:3-1.20, outlining the process for obtaining such reasons. No one disputes that these reasons were provided here. Petitioner, once she received them, determined not to appeal to the Board, under N.J.A.C. 6:3-1.20(a). Consequently, that issue, and the validity of petitioner's evaluations, raised for the first time in post-hearing brief, is now closed.

No statutory, regulatory, or decisional precedent has been provided which would establish that abbreviated contracts are impermissible, per se. Here, the practice was used by the Board for an avowedly beneficent purpose. Whether judged on its merits as a practice in the abstract, or scanned for the propriety of its application here, the "short contract" has not been shown to be arbitrary, capricious, or unreasonable. Even if petitioner had chosen to pursue her claim under Donaldson Supra, she would not have succeeded, at least on this record, (Id, at 247). None of the reasons (Exh. J-10) for non-renewal emerge as statutorily or constitiutionally impermissible.

CONCLUSION

I **CONCLUDE**, therefore, after review of the stipulated facts, legal arguments, and for the reasons set forth in the ANALYSIS portion of this opinion, that:

1. Petitioner's verified petition of appeal before the Commissioner of Education was timely filed, pursuant to N.J.A.C. 6:24-1.2.

2. Respondent Board's practice of appointing teachers for less than a year, and its employment of of petitioner, beginning July 11, 1987 through January 19, 1988, was not arbitrary, capricious or unreasonable, or in any way unlawful.

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ORDER

I **ORDER**, therefore, that petitioner's appeal for relief be, and hereby is, **DENIED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

August 12, 1988
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

August 12, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

Aug 12, 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

lh

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CHRISTEL COMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon a careful review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Petition of Appeal in the instant matter was timely filed for the reasons expressed by the ALJ. Moreover, the Commissioner concurs with the ALJ's finding that the East Brunswick Board's "short contracts" policy is not impermissible, illegal, arbitrary or capricious, nor was its employment of petitioner, beginning July 11, 1987 through January 19, 1988, arbitrary, capricious or unreasonable. The Commissioner would add, however, his observation that the Board appears to be laboring under a misapprehension that merely by offering a nontenured teacher a contract for a full academic year, it is somehow precluded from cancelling that contract at a later date, thus necessitating, in part, apparently, its resort to abbreviated contract periods. It is clear from the record that its contracts for nontenured employees contain a 60-day clause. It need only invoke such clause, or be prepared to pay 60 days' salary in lieu of notice to cancel any such contract commitment. Tenure, pursuant to N.J.S.A. 18A:28-5, will only attach upon its terms, not upon the terms of a contract.

Similarly, petitioner would also appear to be laboring under a misconception. Even if the Board had offered her a contract for a full academic year, the expiration of which would have carried her into her time for the acquisition of tenure, the contract itself would not have precluded the Board from invoking the 60-day notice clause to terminate her employment at any time prior to the date she would acquire tenure.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision as supplemented herein.

COMMISSIONER OF EDUCATION

September 22, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7034-87

AGENCY DKT. NO. 254-8/87

PAULINE PAPAILIOU,
Petitioner,
v.
HAZLET TOWNSHIP BOARD OF EDUCATION,
Respondent.

Steven B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld)

Malachi J. Kenney, Esq., for respondent (Kenney & Kenney)

Record Closed: July 1, 1988 Decided: August 15, 1988

BEFORE **DANIEL B. MC KEOWN, ALJ:**

Pauline Papailiou (petitioner) claims the Hazlet Township Board of Education (Board) violated her tenure and seniority rights by its failure to employ her on a full-time basis for 1987-88 and/or that the Board did not properly establish her less than full-time salary at a level lesser than that to which she is legally entitled. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted March 21, 1988 at the Hazlet Township municipal building, Hazlet Township. The record closed June 30, 1988.

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ISSUES

During a prehearing telephone conference call on January 6, 1988 the parties agreed that the issues to be resolved in the matter are as follows:

A. Whether the Board violated petitioner Papailiou's tenure and seniority rights by its failure to employ her on a full-time basis for 1987-88 by (1) employing on a full-time basis persons who have less seniority than she in positions to which she has a seniority claim or (2) by arbitrarily and without good cause under N.J.S.A. 18A:28-9 eliminating language laboratories in order to justify petitioner's less than full-time employment.

1. If the Board eliminated language laboratories in order to merely justify petitioner Papailiou's less than full-time employment, is petitioner Papailiou entitled to an Order by which the Board would be required to employ her full time in any category in which she has seniority, or some other relief, or no relief.

B. Even if the Board did not violate petitioner Papailiou's tenure and seniority rights with respect to her lack of full-time employment, did the Board improperly establish petitioner's part-time salary at a level lesser than that to which she is entitled.

BACKGROUND FACTS

The background facts of the matter as established by a preponderance of credible evidence and over which there is no dispute between the parties are these. Petitioner was initially employed by the Board as a teacher of foreign languages for the 1983-84 academic year. At that time petitioner possessed an instructional certificate with endorsements to teach French and German at the secondary level and she possessed an educational services certificate with an endorsement as a reading specialist. (J-27, J-28, J-29)

During her first year of employment with the Board petitioner was assigned to teach four sections of high school pupils. She taught two sections of German and two sections of reading. Between the 1984-85 academic year through the 1986-87 academic year petitioner was always assigned at least five sections. Generally, these sections included two or three sections of German, one or two sections of French, and one section of reading. However, during the 1986-87 academic year instead of teaching one section of

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reading, petitioner was assigned one section of language laboratory and two sections of French at the Beers Street Middle School. This language laboratory is not a "laboratory" in a traditional sense. Rather, it was a time set aside by the teacher to be available in a classroom for pupils who determined they needed one-to-one assistance from the teacher in that particular foreign language. The pupil would determine to report to the teacher and receive such assistance. No other scheduled courses at the middle school level offered such time to assist pupils.

The Board acted on April 27, 1987 to abolish the position of foreign language teacher. (J-2) The Board's school business administrator advised petitioner on April 28, 1987 (J-3) that her position of employment was abolished and that her employment would not be continued into the 1987-88 academic year. The business administrator advised petitioner she would be placed on a preferred eligibility list for reemployment according to her seniority and certification.

Petitioner thereafter advised the Board president on May 1, 1987 (J-4) that she should be included on a preferred eligibility list as a teacher of reading and reading specialist, and on the list as a teacher of French, including continuing on the list the Board placed her as a teacher of German. In addition, petitioner sought the Board president's assistance in getting the Board to review its earlier determination to abolish her position of employment. On June 3, 1987 the superintendent of schools to whom petitioner's letter of May 1 was referred advised petitioner that upon advice of counsel she does possess seniority rights as a teacher of French and as a teacher of reading. (J-6)

In the same letter, petitioner was advised that she was being offerred continued employment as a part-time teacher of French for the 1987-88 academic year. The superintendent advised her that if she accepted the offer her schedule on a part-time basis for 1987-88 would be to teach two periods of French at the Union Avenue Middle School, one travel/lunch period, and then to teach two sections of French at the Beers Street Middle School. Petitioner was further advised that she would be compensated at 5/8 of what her full-time salary would have been; that as a part-time employee she was not eligible for representation by the Hazlet Teachers Association; and that her sick leave benefits would be limited to those required by law. It is noted that a middle school full-time teacher is assigned six instructional periods and two duty periods, a total of eight period assignments throughout the day. Petitioner was assigned four instructional periods. Nevertheless, her salary was set at 5/8 of what her full-time salary would have been.

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Petitioner accepted the offer to be a part-time teacher of French and so notified the Board on June 10, 1987. In addition, petitioner advised that her acceptance was without prejudice to her rights to "litigate" the entire matter. (J-7) Petitioner testified that unlike her full-time schedule when she received a full 42 minute lunch period, this modified schedule allowed her, depending upon travel time necessary, 10 to 15 minutes for lunch. The evidence is persuasive, however, that normal travel time between the two schools in the Hazlet Township district takes no more on average than 15 minutes which would allow petitioner approximately 25 to 30 minutes for lunch.

It is not disputed that at about the same time during April/May, 1987, when petitioner's full-time position of employment was abolished, the Board and the superintendent were attempting to reorganize the foreign language program at the middle school. During 1986-87 the Board had two part-time teachers of Spanish and of French assigned to the middle school, one of whom was petitioner. The superintendent explained that the Board wanted to eliminate the part-time teachers of foreign language at the middle school in order to secure full-time staff members to avoid having part-time teachers look for full-time employment elsewhere. To accomplish this goal, the superintendent needed teachers with dual certification in French and Spanish for each of the Board's two middle schools. As noted above petitioner is authorized to teach French, not Spanish.

Petitioner produced no evidence to show that any person at the elementary or secondary level with less seniority than she was offered full-time employment as a teaching staff member for 1987-88. All teachers of French employed full-time have greater seniority than she; all teachers of reading employed on a full-time basis have greater seniority than she; and, the Board no longer offers German.

Petitioner did not have a paid preparation period during 1987-88, nor was petitioner assigned a paid language laboratory period because the language laboratory periods were eliminated at the middle school level. Petitioner had a lunch period less than the average 44 minutes allowed for lunch to full-time teachers during 1987-88. Petitioner produced evidence of teaching loads of part-time teachers in prior years and their salaries for comparative purposes to her present teaching load and present salary. In this regard, there is evidence which shows that during 1986-87 Sylvia Gentner was assigned three instructional periods of Spanish, one preparation period and one lunch period, but her salary was 1/2 of a full-time teacher. There is evidence which shows that

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during 1986-87 Jane Husbands was assigned four instructional periods of arts and crafts, and one preparation period, and she was paid 1/2 of her full-time salary. During 1984-85 Ms. Husbands was assigned four instructional periods of art, one preparation period, and one duty period and her salary was 1/2 of a full-time salary. In 1985-86 Necia Marko was assigned four instructional periods of art and one preparation period for which she was compensated 1/2 of a full-time salary. During 1978-79 C. Mason was assigned two instructional periods of Spanish for which he was compensated 2/5 of a full-time salary. During 1986-87 there is evidence to show that Linda Scott was assigned two instructional periods of French, one language laboratory, one preparation period and she had one lunch period for which she was compensated 1/2 of her full-time salary. Gail Tursi, during 1984-85, was assigned two instructional periods of French, one preparation period, one language laboratory, one lunch period for which she was compensated 1/2 of her full-time salary. During 1985-86 Ms. Tursi was assigned two instructional periods of French, one language laboratory, one preparation period, one lunch period for which she was compensated 1/2 of a full-time salary. During 1986-87 Janet Mickelsen was assigned three instructional periods of Spanish, one preparation period, one laboratory, and one lunch period for which she was compensated 1/2 of a full-time salary, while in 1987-88 Ms. Mickelsen was assigned three instructional periods of Spanish for which she received 1/2 of a full-time salary. There appears to be agreement that the schedule in evidence (J-26) of Francisca Thompson is incorrect to the extent it shows Ms. Thompson to be a part-time teacher. The testimony of the superintendent is clear that Ms. Thompson is a full-time teacher.

Petitioner admits, despite her allegation to the contrary she never heard the superintendent make any statement or comment nor was she told by the superintendent that she was not to be assigned a preparation period during 1987-88 or that she was not being given a full-time teaching position because he resented her attitude or her complaint regarding the Board's initial failure to recognize her accrued seniority in French and in reading. Petitioner admits not having received reports from any other person that the superintendent indicated to them he intended to punish her for her complaints or for her attitude and, in fact, petitioner testified that she had no evidence that the superintendent had any such intention towards her.

This concludes a recitation of the background facts of the matter over which there is no dispute. These facts constitute all relevant and material facts necessary for disposition of the petition of appeal.

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ARGUMENTS OF THE PARTIES

Petitioner contends that the Board established her salary in an arbitrary, capricious and unreasonable manner at a level lesser than that to which she was entitled based upon existing scheduling practices within the Hazlet Township school district and that, as such, her tenure rights under N.J.S.A. 18A:6-10 were violated. With the exception of the citation to N.J.S.A. 18A:6-10, petitioner cites no other statute nor case law in support of her contention that she is entitled to compensation at a higher level than the level established by the Board.

The Board contends petitioner failed to establish her tenure and seniority rights were violated; that she failed to establish its decision not to offer a language laboratory violated any of her statutory rights; that petitioner failed to establish any statutory or contractual right to a specific salary level; that petitioner failed to establish the Board was motivated by any discriminatory or otherwise improper reason regarding the establishment of her part-time salary; and, the Board contends that because of the absence of proof presented by petitioner it acted in any way improper the Commissioner is without jurisdiction to substitute his judgment for its judgment regarding individual compensation for part-time employees.

DISCUSSION AND CONCLUSION

Petitioner offered no basis upon which to show she is entitled to a salary higher than the salary established for her by the Board for 1987-88. Petitioner does not contend that the Board initially abolished her full-time position of employment in bad faith, nor does she offer any evidence to show that the Board established her salary at 5/8 of a full-time salary for unlawful reasons. Petitioner's reliance on evidence from prior years of what other part-time teachers may have received and her comparison of the time they actually spent on the job in minutes with the time she presently spends on the job in minutes to somehow show they were paid more than she is presently being paid is simply not sufficient to establish a legal entitlement to a higher salary.

Even if in prior years all part-time teachers received a paid preparation period, such a prior practice does not translate under Education Law, N.J.S.A. 18A:1-1 et seq., to a statutory entitlement for petitioner which may be enforced by the

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Commissioner. Foreign language laboratory periods, according to the evidence in this record, were eliminated by the Board because the Board made a policy decision that because no other courses offered at the middle school level had a language laboratory period that foreign languages would no longer have a foreign language laboratory period. Petitioner's lunch time was scheduled according to a regular schedule and it is recognized that part of her lunchtime had to be used for traveling between the Beers Street and Union Avenue middle schools. Petitioner has no legal entitlement to a full lunch period in the same manner as full-time teachers. Petitioner's salary was established at 5/8 of a regular full-time teacher because she was assigned four instructional periods and the Board decided to pay her for her travel lunch period.

While N.J.S.A. 18A:6-10 prohibits the dismissal or reduction in compensation of teachers who have acquired tenure, as has petitioner, N.J.S.A. 18A:28-9 et seq., authorizes boards of education to reduce staff. It has already been noted that petitioner presented no evidence to show that the Board took the initial action to abolish her full-time position of employment in that faith.

For all the foregoing reasons, petitioner has failed in her burden of persuasion to establish entitlement to a salary at a level higher than the salary established for her by the Board for 1987-88 and petitioner has failed in her burden to show that either her tenure rights or her seniority rights were somehow violated by the Board. For all these reasons, the petition of appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

August 15, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

8/16/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 18 1988
DATE

Ronald I. Parker/H.S
OFFICE OF ADMINISTRATIVE LAW

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PAULINE PAPAILIOU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that petitioner's exceptions to the initial decision, as well as the Board's reply to those exceptions have been filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Three points of exceptions are advanced by petitioner in conjunction with the findings and conclusions reached in the initial decision.

EXCEPTION ONE

> THE ADMINISTRATIVE LAW JUDGE FAILED TO COMPLY WITH THOSE PRESCRIPTIONS OF N.J.A.C. 1:1-16.3 (INITIAL DECISION) WHICH REQUIRE ADMINISTRATIVE LAW JUDGES TO (1) ANALYZE THE FACTS ADDUCED AT THE HEARING IN RELATION TO THE APPLICABLE LAW AND COVERING ALL ISSUES OF FACT AND LAW RAISED IN THE PLEADINGS; (2) DELINEATE FINDINGS OF FACT WITH REGARD TO DISPUTED FACTUAL ISSUES; AND (3) SPECIFY CONCLUSIONS OF LAW BASED UPON THE FINDINGS OF FACT (emphasis in text)
> (Petitioner's Exceptions, at p. 1)

EXCEPTION TWO

> THE ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO CONCLUDE THAT THE HAZLET TOWNSHIP BOARD OF EDUCATION ACTED IN AN ARBITRARY, CAPRICIOUS AND UNREASONABLE MANNER IN ESTABLISHING PETITIONER'S COMPENSATION AT A LEVEL LESSER THAN THAT TO WHICH SHE WAS ENTITLED, BASED UPON EXISTING SCHEDULE PRACTICES AND POLICIES WITHIN THE HAZLET TOWNSHIP SCHOOL DISTRICT (Id., at p. 5)

EXCEPTION THREE

> THE ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO CONCLUDE THAT PETITIONER'S TENURE RIGHTS WERE

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> CONTRAVENED AS A RESULT OF THE BOARD OF EDUCATION'S DETERMINATION TO COMPENSATE HER ON A 5/8TH'S BASIS FOR THE 1987-88 SCHOOL YEAR
> (Id., at p. 6)

The Board rejects petitioner's arguments as being misplaced, erroneous and irrelevant to the specific issues adjudicated herein. The Board therefore urges the Commissioner to affirm as his own the findings, conclusion and recommendations reached by the ALJ for the reasons set forth in the initial decision as well as those reasons advanced in its reply to exceptions which are incorporated by reference herein.

The Commissioner has reviewed the opposing positions advanced by petitioner and the Board related to the findings and conclusion in the initial decision. Upon further review of the exhibits in evidence, as well as the undisputed facts contained in the record of this matter, the Commissioner is not persuaded that a reversal of the initial decision is warranted as urged by petitioner.

The Commissioner observes that petitioner correctly relies on the provisions of N.J.A.C. 1:1-16.3 which stand for the proposition that the ALJ in rendering his initial decision is required to

> analyze the facts adduced at the hearing in relation to the applicable law and cover all issues of fact and law raised in the pleadings;
>
> delineate findings of fact with regard to the disputed factual issues; and
>
> specify conclusions of law based upon the findings of fact.

The Commissioner is satisfied, however, that the ALJ did comply with the above-cited regulations notwithstanding the fact that the procedural format of the initial decision does not specifically identify a section provided for that purpose.

It is further noted that the relevant undisputed facts which are material to the issues raised in the initial decision, ante, have been addressed by the ALJ under the heading of "Background Facts." Moreover, it is observed that the respective arguments of the parties pertaining to the issues in controversy were delineated in the initial decision and, further, that the ALJ did specify his conclusion of law based on the relevant facts of this case. While petitioner does claim that other facts which are undisputed in the record and ignored by the ALJ are relevant to the final disposition of this matter (see Exception One, at pp. 2-5), the Commissioner finds no merit in petitioner's argument.

In this regard, the Commissioner finds and determines that the ALJ properly concluded in his recitation of the background

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facts, which were undisputed by the parties, that those facts "constitute all relevant and material facts necessary for disposition of the petition of appeal." (Initial Decision, ante)

With regard to the relevancy of those additional undisputed facts relied upon by petitioner in Exception One, the Commissioner finds her arguments to be without merit specifically for the reasons advanced by the ALJ in his "Discussion and Conclusion." The Commissioner hereby adopts as his own those findings and conclusion set forth in the initial decision which establish as fact that:

1. Petitioner offered no basis upon which to show she is entitled to a salary higher than that salary established by the Board for 1987-88.

2. Petitioner does not contend that the Board initially abolished her full-time position of employment in bad faith, nor does she offer any evidence in the record before the Commissioner to show that the Board established her salary at 5/8 of a full-time teacher's salary unlawfully.

3. Petitioner's reliance upon evidence from prior years with regard to the salaries other part-time teachers received for time spent on their jobs in comparison to the time she presently spends on the job, is insufficient to establish a legal entitlement to a higher salary.

4. The Board did not act in an arbitrary, capricious or illegal manner or in bad faith when it abolished petitioner's full-time teaching position and subsequently assigned her to a 5/8 teaching position and established her salary at 5/8 of a full-time teacher's salary which included four instructional periods and one paid travel lunch period.

However, the Commissioner does not agree with the finding of the ALJ which holds that petitioner is not entitled to a duty-free lunch period during hours normally used for lunch periods in the schools where she is assigned to teach. It is clear from a review of the facts set forth in the initial decision, ante, and petitioner's teaching schedule (J-13) for the 1987-88 school year that the lunch periods for Union Avenue Middle School and Beers Street Middle School are the same. These lunch periods commence at 11:34 a.m. and end at 12:18 p.m.

The Commissioner cannot agree that approximately 30 minutes of petitioner's paid travel time between the schools is to be considered as part of her duty-free lunch period. In this regard,

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he relies upon the provisions of N.J.A.C. 6:3-1.15 in reaching this determination:

> Any teacher employed in both morning and an afternoon section shall be entitled to a duty-free lunch period during the hours normally used for lunch periods in the school. The duty-free period shall be not less than 30 minutes except in a school where the lunch period for pupils is less than 30 minutes in which case the duty-free lunch period shall not be less than the lunch period time allowed pupils. (emphasis supplied)

To the extent that the initial decision holds to the contrary, it is hereby reversed. The Board is directed to comply with the provisions of N.J.A.C. 6:3-1.15 in the event that petitioner's lunch period for the 1988-89 school year has been established in the same manner without according petitioner a full duty-free lunch period.

In all other respects, however, the initial decision is affirmed for the reasons set forth therein.

Accordingly, the Commissioner finds and determines that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

September 27, 1988

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INITIAL DECISION
OAL DKT. NO. EDU 5033-88
AGENCY DKT. NO. 170-6/88

JOHN A. AND MARY T. PETRONE,
ON BEHALF OF K.A.P.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF MOORESTOWN,
Respondent.

John A. Petrone and Mary T. Petrone, petitioners, pro se

Edgar E. Moss, II, Esq., for respondent (Moss, Powers, Kugler and Lezenby, attorneys)

Record Closed: August 22, 1988 Decided September 1, 1988

BEFORE **BRUCE R. CAMPBELL, ALJ:**

John A. Petrone and Mary T. Petrone, petitioners, allege and the Moorestown Township Board of Education (Board), respondent, denies that the Board has selectively redistricted pupils who would have otherwise attended kindergarten at the Roberts Elementary School in Moorestown in the 1988-89 school year.

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PROCEDURAL HISTORY

The petitioners filed the present appeal before the Commissioner of Education on June 8, 1988. The Board filed its answer on June 28, 1988. On or about June 23, 1988, the petitioners filed an amended appeal. The Department of Education transmitted the matter to the Office of Administrative Law on July 7, 1988, as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The Board's amended answer did not reach the Office of Administrative Law until August 16, 1988, but is date stamped as received in the Department of Education on June 30, 1988.

In their pleadings, the petitioners sought a stay of Board action. On August 11, 1988, the parties appeared before the Honorable Beatrice S. Tylutki, ALJ. Judge Tylutki hear oral argument regarding the request to enjoin the implementation by the Board of its busing plan adopted on May 2, 1988. Following oral argument, Judge Tylutki conducted a prehearing conference in this matter. On August 12, 1988, Judge Tylutki issued an order denying the request for temporary order restraining implementation of the busing plan.

The matter was transferred to me for all purposes, including disposition. I conducted a plenary hearing on August 22, 1988, at the Willingboro Municipal Court.

PAROL AND DOCUMENTARY EVIDENCE

The petitioners adduced testimony that the Board commissioned a study of building capacities and utilization. The final report was delivered to the Board on March 4, 1988 (P-1). The report finds that the Board must immediately provide additional instructional space for the Roberts School. The Board also created an Elementary Enrollment Advisory Committee (EEAC) in February 1988 and charged it to (1) review existing and projected enrollment data at the elementary level (2) explore possible options for space utilization at the elementary level for the 1988-89 school year, and (3) submit recommendation(s) to the superintendent for resolving the problem.

The Committee met for four weeks in February-March 1988.

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In its report to the Board, the EEAC specifically addressed movement of two sessions at the kindergarten level from the Roberts School to the South Valley School (P-11). The report considers costs, transportation, community reaction, long term impact, advantages and disadvantages.

The EEAC was made up of professional and lay people. The EEAC report and the study of building capacities report culminated more than a year of discussion.

There was testimony that the EEAC explored a number of options, all addressed at short-term relief of space problems. Various reassignment patterns were explored as was the use of relocatable (temporary) classrooms. The Board discussed the various options over several meetings. On April 18, 1988, the Board directed the then superintendent to further explore the relocatable option and to consider redistricting as an option (J-2). On April 25, the Board held a special meeting. A Board member presented information on enrollment growth in the district and the superintendent presented the information on elementary pupil distribution. Public comment was solicited. Among the comments and questions were:

(1) Is there an education problem with movement of kindergarten children?
(2) Original proposal (transportation of kindergarten to South Valley) is still most viable option-a number of parents, after consideration support this plan.
(3) No one supports proposal to move kindergarten to South Valley.
(4) Against relaxed class size guidelines.
(5) Against redistricting.
(6) Combination of relocatables and redistricting could be used.

After the public comments, the Board announced that it would make a decision at a special meeting to be held on May 2 (J-3).

The Board did conduct a special meeting on May 2, 1988 in the high school media center. The superintendent proposed that kindergarten pupils in the Roberts area who were bused to school attend the South Valley School and that kindergarten pupils (up to 25, who normally walked to the Roberts School) continue to attend the Roberts School.

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A motion was duly made and seconded to adopt the superintendent's recommendation. After much discussion by the Board both for and against the proposal, and for and against the option of using relocatable classrooms, it was moved and seconded that the original motion be amended to read that all Roberts kindergarten pupils be transported to South Valley School for 1988-89. The amendment was accepted by a 5-3 vote with one abstention.

More discussion followed. Ultimately, the Board voted 5-4 in favor of the proposal (J-4). The Board held a regular meeting on May 16. Several parents expressed concern with the Board's plan to bus pupils from the Roberts School to the South Valley School in 1988-89 (J-5).

The Board held a regular meeting on June 13. Several parents affected by the busing program spoke against it. The Board resolved to restudy the alternatives by a vote of 8-1. The Board president appointed four members including himself, to restudy the question and present a report at a special meeting set for July 13 (J-6).

From exhibit P-5, it is clear that the committee carefully considered the advantages and disadvantages of redistricting, of using relocatable classrooms and of reassigning selected pupils. After what appears to have been considerable debate and discussion, the committee decided to support the Board's decision to assign the 1988-89 Roberts School kindergarten classes to South Valley School. The committee also determined to establish another committee to study enrollment issues and facility utilization for the 1989-90 school year. The enrollment study committee would have broad-based representation.

Other testimony tended to show that each option represented a trade-off. The Board, however, used the present plan as an interim measure. The Board's long-range plan included new construction. Still other testimony tended to show that the affected parents, that is, parents of those pupils who will be bused to the South Valley School for kindergarten, overwhelmingly opposed the plan and would prefer some other option. Despite testimony and Board minutes indicating consideration of the various options, the affected parents believed the Board did not sufficiently study the whole question.

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One community member, using Board data, performed his own analysis of facilities, needs and alternatives (P-12). The report recommends creation of a task force to develop "a reasonable and viable redistricting plan" and asks the Board Building Committee to evaluate modular building alternatives. Ibid.

The petitioners called the Board president who had been a Board member at all times relevant to this case. He stated that he voted against the resolution to implement the controverted transportation plan. He also testified concerning public membership on certain committees and public comment allowed at various Board meetings. He also verified that he appointed the ad hoc committee to restudy the various options. After its deliberations, the committee unanimously recommended that the Board adopt the controverted busing plan.

FINDINGS AND DETERMINATION

Having heard and observed the witnesses as they testified and having reviewed the documentary evidence, I FIND:

(1) The Moorestown Township Board of Education has studied its space needs carefully, over an extended period and has provided mechanisms for citizen imput.
(2) Specifically, the Board commissioned studies of its space needs for the 1988-89 school year and the years immediately beyond.
(3) In addition to at least one professional study, the Board created an Elementary Enrollment Advisory Committee, which included two lay members.
(4) In reference to the 1988-89 school year, the Board identified space needs at the Roberts School and considered several alternative means of meeting those needs.
(5) On May 2, 1988, the Board, by a 5-4 vote, adopted a plan under which kindergarten pupils from the Roberts School would be bused to the South Valley School for the 1988-89 school year.
(6) On June 13, 1988, the Board voted to establish a Board committee to restudy the alternatives to the busing plan.
(7) The ad hoc committee to study the options was composed of two Board members who had voted for the busing plan and two Board members who had voted against it.
(8) The ad hoc committee reviewed all information and options and unanimously recommended to the Board that the plan to transport Roberts School kindergarten pupils to the South Valley School be adopted.

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N.J.S.A. 18A:11-1 provides, in pertinent part,

> The Board shall-
>
> ...
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and transaction of its business and for the government and management of the public schools and public school property of the district...; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

A board of education is an independent governmental entity and has been vested by the Legislature with the responsibility of providing suitable school facilities and accomodations. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966).

Under these broad powers, the Board has discretion to determine pupil attendance areas. Paddock v. Demarest Bd. of Ed. 1974 S.L.D 435; Hoffman v. Cherry Hill Bd. of Ed. 1973 S.L.D. 406; Marcewicz v. Pascack Valley Reg'l High School Dst., 1972 S.L.D. 619; Tolliver v. Metuchen Bd. of Ed., 1970 S.L.D. 415; Citizens of Harrison v. Harrison Bd. of Ed., 1938 S.L.D. 643 (1921).

It has long been the law of this State that, in the absence of prejudice or discrimination, a board may legally transfer children from school to school. Clausner v. Millburn Bd. of Ed., 1938 S.L.D. 645 (1936). Without evidence of unjust discrimination, the Commissioner of Education will not interfere with the determination of a local board of education in the determination of school attendance area lines. Kenny v. Montclair Bd. of Ed., 1938 (S.L.D.) 647 (1934). The petitioners cite C.D. et als v. Lenape Reg'l High School Dist. Bd. of Ed., OAL DKT. EDU 1814-84 (June 26 1984), rev'd Comm'r of Ed. (Aug. 24, 1984), and allege that their petition should be controlled by it and related cases.

C.D., however, is distinguishable from the present case. In C.D., the board planned to implement a modified schedule, called the Staggered Overlap Plan at Shawnee High School. Under the plan, 9th grade pupils only would have an afternoon schedule with no lunch or study hall. Although the board contended it needed the plan to relieve overcrowding conditions at the school, the Commissioner held that the plan would result in the districts's non-certification, if monitored, due to inadequate facilities. The circumstances of the present case are not analogous.

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The Moorestown Board of Education proposes to do no more than to transport pupils who concededly would have attended kindergarten at the Roberts School to the South Valley School for the 1988-89 school year. It is admittedly a temporary expedient and is designed to relieve overcrowding at the Roberts School until a permanent remedy, addressing all spacial needs of the district, can be molded.

The petitioners have established that a great number of the families affected by the kindergarten pupils' transportation program are against it. They also allege but have not shown, that the Board has failed to have adequate public imput into its determination of what should be done to alleviate space problems at the Roberts School. The petitioners have placed 14 of the Board's policies in evidence (P-13a through P-13n). The policies, all carefully drawn, speak to district goals and objectives, school attendance areas, equal educational opportunity, affirmative action, articulation, and several related areas. A careful examination of the policies reveals no violation of any of them. For example, Policy 5117, School Attendance Areas, states:

> The Moorestown Township Board of Education believes in the development of elementary schools on an neighborhood basis where practicable. Elementary age pupils should be able to walk to school, where possible, with parents/guardians able to participate conveiently in school affairs. However, it is not the intent of the board to permit undue racial concentration to exist in any one school.
>
> Other considerations in regard to a pupil's placement in a school shall be the pupil's welfare, the population trend, and location of available classroom facilities.

Taking the words of the policy as having their ordinary meanings, I can **FIND** nothing in this record showing that the Board has acted contrary to this adopted policy.

There are certain questions that arise in the life of a community that generate high feeling. The School Law Decisions cited above instruct that the adjustments of attendance areas is such a question. Had the Moorestown Board of Education proposed to adjust the attendance areas or to transport the pupils from another school, I have no doubt that a different group of citizens would be making the same arguments that are now being heard from the petitioners here.

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In consideration of the facts found above, I **CONCLUDE** that the Moorestown Board of Education and its administrators have acted without arbitratiness, caprice or insensitivity. The Board, over a significant span of time, considered the problem, considered the possible solutions to the problem, arrived at a determination and made a decision. It went so far as to reconsider that decision. In the reconsideration process, Board members who had originally opposed the transportation plan came to endorse it. While a number of persons in the community do not like that decision, it is not the function of the Commissioner and, therefore my function to substitute judgment for that of the local board of education. Caffery v. Millburn Bd. of Ed., 1975 S.L.D. 630.

Accordingly, the petition for an order prohibiting implementation of the Pupil Transportation Plan is **DENIED**. The petition is hereby **DISMISSED**. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

1 SEPTEMBER 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

9-6-88
DATE

OFFICE OF ADMINISTRATIVE LAW

km

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J.A.P. AND M.T.P., on behalf of K.A.P.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no timely exceptions to the initial decision were filed by the parties pursuant to N.J.A.C. 1:1-18.4. Upon review of the findings and conclusion set forth in the initial decision, the Commissioner finds and determines that the Board, in adopting its Pupil Transportation Plan to have its kindergarten pupils from the Roberts School attendance area transported by bus to attend kindergarten at the South Valley School for the 1988-89 school year, took all of the appropriate steps to minimize the impact it would have on the affected pupils and their parents. The Commissioner observes that the Board's decision was not precipitous, but rather it resulted from extensive dialogue among its members, administrative and supervisory staff, as well as committees comprised in part of the community at large. It was not until after the Board considered all of the information it compiled through various studies conducted and comments received from the residents of the community, that it finally decided on the Pupil Transportation Plan which, in its judgment, would be in the best interest of everyone concerned, especially the kindergarten pupils who were to be transported from one school attendance area to another.

Where the action of a local board of education is not taken for statutorily proscribed reasons or in an arbitrary or capricious manner, the Commissioner will not substitute his judgment for that of the local board of education.

Accordingly, the Commissioner adopts as his own the findings, conclusion and recommendation set forth in the initial decision of this matter.

The instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 30, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1302-88
AGENCY DKT. NO. 16-2/88

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
DELIA KIND,
Respondent.

Robin T. McMahon, Esq., for petitioner
(Vicki A. Donaldson, General Counsel, attorney)

Irving C. Evers, Esq. for respondent
(Giblin and Giblin, attorneys)

Record Closed: July 18, 1988 Decided: August 26, 1988

BEFORE **JAMES A. OSPENSON, ALJ:**

The Board of Education of the City of Newark, Essex County, filed and certified with the Commissioner of the Department of Education tenure charges of inefficiency, incompetency/other just cause and unbecoming conduct against Delia Kind, a tenured teaching staff member in its employ, pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. She was suspended without pay on January 26, 1988. Charges were filed in Bureau of Controversy and Disputes of the Department of Education on February 1, 1988. Respondent's answer with affirmative defenses was filed there on February 26, 1988. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on March 3, 1988 for hearing and determination as a contested

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case in accordance with N.J.S.A. 52:14F-1 et seq. The seventh separate defense raised was non-compliance by the Board with procedural provisions of N.J.A.C. 6:24-5.1(c) and N.J.A.C. 6:24-5.2.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on April 4, 1988 and an order was entered establishing, inter alia, hearing dates beginning June 13, 1988. The matter was heard on June 13, 14, 15 and 16, 1988 and concluded. Thereafter, time for posthearing submissions having elapsed and such submissions having been made, the record closed.

The prehearing order provided that at issue in the matter generally were (1) procedural regularity of filing and certification of tenure charges under N.J.A.C. 6:24-5.1, 5.2; (2) whether the Board shall have proven by a preponderance of the credible evidence respondent was guilty of the tenure charges as filed and specified; and (3) whether, if so, the charges as proven were sufficient to require respondent's removal or reduction in salary.

At commencement of hearing on June 13, 1988, respondent formally withdrew and dismissed her separate seventh defense concerning procedural irregularity of filing and certification of tenure charges under N.J.A.C. 6:24-5.1, 5.2.

EVIDENCE AT HEARING

I

It was outlined by the Board in opening at hearing that the focus of the charges and specifications would be respondent's performance in the 1985-86, 1986-87 school years and her performance during the 90-day correction period under N.J.S.A. 18A:6-11 on the charge of inefficiencies in the 1987-88 school year. The 90-day correction period was from beginning of the 1987-88 school year until December 7, 1987. A report of the administration to the Board concerning results of the 90-day correction period was made by respondent's building principal on December 10, 1987. D-2, D-3 and D-4(a-d). The

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opinion was that respondent continued to be deficient as outlined in the tenure charges; the recommendation was initiation of further proceedings looking to removal.

Called by the Board, Alphonse Rossi, a Board employee for some 28 years, presently assistant to the executive superintendent of schools since August 1987, was principal of Barringer Prep High School from 1982 to 1987. He evaluated respondent's performance at Barringer on April 18, 1986, a written evaluation (A-4) that respondent refused to sign. The overall rating for respondent in her general mathematics class was unsatisfactory. The observation on that date was announced. Rossi noted students arrived late; the class did not start on time, rather ten minutes late; no attempt was made by respondent to ask students why they were late; students wandered around during class; chairs were not aligned. In his comments, Rossi suggested respondent establish a seating chart and create centers of interest. He noted books had not been collected at the end of the class period. Respondent was instructed that each student had to be assigned a textbook. Her reply was the students would lose them. Rossi noted respondent sat at her desk and did not move around; she did not appear interested. Lesson plans were not available. A-4 at 3. Rossi listed some seven additional comments and recommendations on respondent's inadequacies in A-4 at 6. Rossi noted as well that respondent was tardy at school every day, sometimes 20, 30 or 40 minutes each day. Teachers were required to be at school at 8:20 a.m. The observation and evaluation was presented to respondent at a postobservation conference. She refused to sign and became emotional.

Shown Exhibit A-8, Rossi identified it as an attendance improvement program report for 1984-85. Respondent was recorded as having had 20 absences for sickness and 61 latenesses.

He identified A-9 as an attendance improvment program report for 1985-86. Respondent had 17 sick absences and 103 latenesses.

Exhibit A-10 was an attendance improvement program report for 1986-87. It showed numerous sick absences and latenesses.

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Rossi's memorandum to respondent on February 24, 1986 (A-13) recorded at that time her absences stood at 18 occasional absences with 52 latenesses. She was ordered to appear for a referral conference to discuss the absences and told that formal action might be taken by the Board against her as a result of her poor attendance record.

Rossi's memorandum to respondent on April 6, 1987 (A-16) recorded that her absences at that time were 18 or more; she was ordered to appear for a referral conference to discuss that record.

A-10, an attendance improvement record for 1986-87, showed 20 absences and 74 latenesses.

Rossi stated that respondent's numerous absences and frequent and numerous tardinesses affected the delivery of education services in the district. They caused breakdown in classroom control, disrupting education, and required employment of substitute teachers. Tardiness adversely affected delivery of education services especially, he said, since there was a lack of coverage in classrooms without teachers. Student attendance suffered as a result. Bad examples were set. Organization broke down.

Rossi recommended to the office of the superintendent that action be taken to withhold respondent's increment for the ensuing school year, while simultaneously proceeding to terminate her services based on charges of inefficiency. At that time she had a fourth unsatisfactory evaluation during the then current school year. A-6. Rossi further recommended to the office of the superintendent on February 3, 1987, that tenure charges be instituted against respondent (A-7) for six unsatisfactory evaluations since September 1986, for failure to develop classroom environment ensuring safety of students, for failure to instruct students in compliance with accepted standards, for failure adequately to teach proscribed curriculum for ninth grade mathematics, and for refusal to discuss unsatisfactory evaluations with administrators.

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During cross-examination, Rossi emphasized he had been respondent's supervisor for some five years. He first noted her performance deficiencies in decline long ago. The personal evaluation of April 18, 1986 (A-4a) was not his first. It was a formal evaluation by him. Respondent's classes at the time were ninth grade general mathematics, that is, for those students who did not take algebra or had fallen below grade level. Respondent had some special education students assigned to the class and some with discipline problems. In his conference with respondent, he said, he did not take those students and their problems, if any, into consideration. But respondent's class, the one he observed, was the only one he had observed in the building with total student movement and disruption during class. There were no assigned seats. There were no seating charts. Respondent could not produce one. He expected her not to let students arrive late; teachers, he said, should orient their students at the beginning of the year. Respondent's students would walk around and sometimes go out of class. In conference, respondent told him she had physical problems and difficulty rousing herself in the morning, a reason, she said, for her latenesses. Rossi told her to give him medical certification of any condition she claimed to suffer from; she never did, nor did she ever document her sick absences. She never lodged any report that any of her students were on drugs; a drug supervisor in the district was available for such referrals. She told him students should not be assigned textbooks because they simply would not take care of them.

Called by the Board, C. Theodore Pinckney, a Board employee of some 22 years now employed as chairman of Project Opportunity, West Kinney Alternative High School, a second-chance program for school dropouts, testified he was chairman of the mathematics and science departments of Barringer Prep School from 1982 to 1986. He was respondent's mathematics supervisor then. Shown Exhibit A-1, a teacher annual evaluation report of respondent on June 21, 1985, he said he was the evaluating officer. Respondent was graded unsatisfactory in use of effective instructional methods, keeping accurate systematic ongoing records of student achievement, establishing and maintaining effective classroom discipline and managment procedures, and in meeting accepted standards of professional behavior. He noted that respondent had only 40 percent of her students in the compensatory education category, yet only 62 percent of her students passed the MBS, a reflection on her professional ability and performance. The annual

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evaluation report of June 21, 1985 (A-1) was based on several observations and evaluations as well during the 1984-85 school year. It was noted specifically that respondent's grade book failed to show correct achievement scores; management procedures were seen as lacking, for example, no proper lesson plans. It was noted as well respondent was constantly late for classes as well as tardy at the beginning of the school day. Annexed to A-1 was respondent's professional improvement plan for the subsequent year 1985-86. Respondent's professional deficiencies were listed. It was noted respondent never assigned homework to her classes because homework was never reviewed, a circumstance respondent readily admitted, because, as she said, students simply would not do the homework. Time sheets and grades were not timely recorded; teacher attendance and punctuality were pointed out as in need of improvement. The necessity to distribute textbooks was emphasized.

In the 1985-86 school year, on November 21, 1985, Pinckney made a teacher observation report resulting in an overall rating of unsatisfactory performance. In general, he felt student behavior was uncontrolled; the lesson was unplanned; respondent did not review homework. A text reference was at page 33 when class progress should have been at page 100. Respondent's control of the class was graded unsatisfactory, teacher/pupil relation was adversarial; there was no rapport. Students arrived and left whenever they wanted. The unsatisfactory observation of November 21, 1985 prompted a second observation by Pinckney as department chairman the next day, November 22, 1985. Its overall rating in A-3 was likewise unsatisfactory; there was no improvement. Respondent had obviously not undertaken to abide by the PIP of June 21, 1985 in A-1. There was no lesson plan that was relevant to the lesson conducted on November 22, 1985. Textbook reference was then at page 145, having passed from page 30 the previous day, without any clarifying instructions by respondent.

Ultimately, on June 30, 1986, Pinckney reported a teacher annual evaluation for the 1985-86 school year as totally unsatisfactory. A-5. There were no satisfactory ratings in any segment of performance. Pinckney recommended respondent for consultation and leave of absence for rest and so suggested to her. Indeed, he found in comparison to the previous year's teacher and annual evaluation report (A-1) only a negative change in

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performance. He noted especially that respondent's students were out of class often, more so than in the case of any other teacher. She appeared not to have energy. Her students were average in ability as for other teachers of general mathematics.

Overall, Pinckney said, during the school years 1984-85 and 1985-86, respondent never was perceived to have proper lesson plans, which were required by Board policy and which were to be updated every two weeks. What plans respondent submitted never seemed consistent with what evaluators saw her teach during their observations. Overall, as well, he said, was the circumstance that other mathematics teachers had achieved considerably better success in student passing of the MBS than had respondent.

Called by the Board, Leonard Pugliese, a Board employee since 1970 and presently vice principal at Barringer Prep High School since 1980, identified his teacher observation report of respondent of December 13, 1985 as Exhibit B-1. His overall rating of respondent was unsatisfactory. He identified his teacher observation report of January 21, 1986 as Exhibit B-2. Again, respondent's overall rating was unsatisfactory, a report respondent refused to sign. Both reports were reviewed with respondent at postobservation conferences. Pugliese saw no improvement, rather only a worsening, of performance between the two reports. Indeed, he testified, his impression of respondent's class was "chaotic."

Respondent was notified on June 27, 1986 that the Board acted to withhold her salary and/or adjustment increment for the 1986-87 academic year based upon her unsatisfactory annual evaluation for the 1985-86 school year. D-1.

Called by the Board, Roxanne Stridacchio said she has been department chairman of science and mathematics at Barringer Prep High School since September 7, 1986. Before that, she was teacher of mathematics at Barringer Prep since 1980. She identified her teacher observation report of respondent on October 24, 1986 as Exhibit C-1. Respondent's overall rating was unsatisfactory. Respondent was graded unsatisfactory in some 14 of 22 subheadings in the report, to which was attached four pages of additional adverse comments and recommendations for improvement. Stridacchio met with

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respondent in a postobservation conference; respondent refused to sign the teacher observation report. Stridacchio's teacher observation report of respondent on December 11, 1986, was Exhibit C-2. Respondent's overall rating was unsatisfactory in some 17 of 22 subcategories, the report containing six additional pages of adverse comments and recommendations. Clearly, Stridacchio said, and as C-2 indicated, respondent's performance did not improve in the interim between October 24, 1986 and December 11, 1986. Stridacchio's teacher annual evaluation report of respondent on May 7, 1987 was overall unsatisfactory, such gradings having been assigned in ten specific subcategories. The recommendation at that time was for initiation of tenure charges against respondent. A PIP dated May 7, 1987, annexed to C-3, for the 1987-88 school year required respondent to take in-service courses on discipline, visit other classrooms to observe effective discipline procedures, develop a list of different instructional techniques, incorporate supplemental materials into her lessons, review curriculum guides for specifics relating to discipline, incorporate activities as suggested in the curriculum guide, subscribe to professional journals for mathematics teachers and take in-service training courses for professional growth and development.

Stridacchio identified as Exhibit C-5 a memorandum to respondent on March 31, 1987 asking her to submit lesson plans on schedule and to submit previously required lesson plans for approval by the chairperson. Exhibit C-6, Stridacchio's memo to respondent on the same date, reminded respondent of department policy for filing substitute plans, as to which Stridacchio had none then presently on file.

On March 3, 1987, an administrative recommendation was passed to the executive superintendent of schools on March 3, 1987 for initiation of tenure charges against respondent for six unsatisfactory classroom observation reports since September 1986, for failure to have developed proper classroom safety environment, for failure to instruct students in compliance with accepted standards, for failure adequately to teach prescribed curriculum for ninth grade mathematics and for refusal to discuss evaluations and recommendations for improvement of performance with appropriate administrators. D-2.

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On September 9, 1987, Stridacchio notifed respondent of a preevaluation conference scheduled for September 15, 1987, a purpose of which was also to review tenure charges and performance under her 1986-87 PIP. D-5, a memorandum from Stridacchio to respondent on September 23, 1987, scheduled a conference the next day to discuss department policy for filing lesson plans. D-6.

Stridacchio's teacher observation report of respondent on October 7, 1987 (D-12a), with attached attached additional comments and recommendations, found respondent's overall rating was unsatisfactory. Its substance was reviewed in postobservation conference; respondent refused to sign the report. There was no improvement of her performance over prior evaluations and observations.

Exhibits D-14 and D-18 were memoranda to respondent from Stridacchio in October 1987 offering professional training books to help respondent improve her teaching performance. Respondent refused the help, saying she already had a teacher's guide.

By memorandum to an administrative supervisor on November 18, 1987, Stridacchio requested respondent be granted an administrative day leave for the purpose of enabling her to observe another teacher of mathematics who had demonstrated effective instructional techniques at a site other than Barringer Prep. This assistance was profferred to respondent to help her improve in the 90-day notice period before initiation of tenure charges of inefficiency.

Exhibits D-29 through D-37 were parent and/or student requests for transfer from respondent's class for reasons generally described as failure to teach or assignment of only busy work. The period of time covered was from September through November 1987. Stridacchio said some four to six students were actually transferred from respondent's class by October 1987, but there were other verbal requests for transfer. Ultimately, her class size was down to some seven to nine students. An average class was about 20.

Stridacchio said respondent never came to her for help during the 90-day notice period and improved only a little if at all during it. Her overall opinion was that by

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December 1987 respondent had evidenced some improvement in lesson and substitute plan filing over October 1987. But there still remained deficiencies and unsatisfactory performance in all remaining areas. Her recommendation was that tenure charges should proceed. Respondent had specifically refused Stridacchio's help in improvement in the areas of lesson plans, classroom discipline and accepting teacher training reference materials. In effect, she said, she was not given the opportunity by respondent to help.

Called by the Board, Maria Parker, a mathematics department chairperson employed by the Board at Vailsburg High School for the past six years, testified she was specially commissioned to make a teacher observation and evaluation of respondent on October 29, 1987. Her report is D-22(a). [The special observation was requested of the superintendent's office by Principal John D. Petrozzino on October 14, 1987 because of respondent's unsatisfactory evaluation on October 7, 1987 and the postobservation conference on October 14, 1987. The special observation was arranged for; respondent was given express written notice that she would be observed by Parker on October 29, 1987. D-21.] Parker, an experienced teacher/administrator, recorded an overall rating of unsatisfactory for respondent. She noted respondent's class had only nine students; thus it was not typical because classes usually contained between 20 and 30 students. She noted several students arriving late and talking; one had a radio playing; the class did not begin on time. Students talked and debated during instruction. Parker found specific areas of weakness in ill-defined lesson planning, a need for more manipulative learning through class exhibits, better attempt at mastery of concepts, poor attempt to inculcate lesson comprehension of basic concepts, inadequate planning and research into the lesson, failure to note level of student proficiencies, failure to use graphic aids to increase relevancy and understanding, and failure to repeat decimals.

In all, respondent was found deficient in planning, explanation and decisiveness. Parker met later with the principal, a vice principal, respondent and her union representative. Respondent refused to sign the evaluation report.

Significantly, Parker testified she was unaware of pending tenure charges against respondent or that she was in a 90-day notice period for inefficiencies.

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Parker noted that only a few students had paper texts; all students, she said, should have been assigned texts but apparently had not been. The paper text or workbooks appeared inadequate for the lesson purpose. She noted that chairman Stridacchio later showed her text materials and training aids available for respondent's use in the mathematics resource room. She noted, finally, that what had been ostensibly planned was not followed in instruction by respondent in class; there was, as she termed it, a disjunction. Respondent did not make any homework assignment.

Called by the Board, John D. Petrozzino, a Board employee of 27 years, said he assumed the principalship of Barringer Prep on August 20, 1987. Before then he had been department chairperson in industrial and practical arts at West Side High School for four years. He became aware of the tenure charge problem with respondent early in 1987 through Stridacchio; he was aware of the 90-day inefficiency notice period beginning in September 1987 and was kept advised of respondent's progress during it by Stridacchio. He was provided with a copy of respondent's October 13, 1987 unsatisfactory observation report by Stridacchio. P-2. It was he who requested of the superintendent's office that an outside evaluator be provided. D-20. His reason, he said, was that he sensed respondent felt she was being unfairly treated by Stridacchio, her normal observer and evaluator, and thought that independent observation and evaluation would alleviate such feelings if they existed.

At conclusion of the 90-day notice period on December 10, 1987, Petrozzino said, he formally recommended to the superintendent's office that tenure proceedings go forward to terminate respondent's employment as teacher with the Newark Board of Education. D-3. His formal "overview" of respondent's performance during the 90-day correction period is D-4(a-d). The overview was in three sections: section I focused on the observation/evaluations conducted during the period; section II focused on respondent's attendance/tardiness; and section III contained other information about her deficiencies.

Petrozzino noted that the outside evaluation by Parker was formally announced beforehand to respondent. He noted respondent had been granted an administrative day leave for December 1, 1987 for the purpose of providing her an opportunity to observe

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another teacher of mathematics who had demonstrated effective instructional techniques at a site other than Barringer Prep. D-25.

The number of respondent's absences and latenesses in the 90-day correction period, which were excessive, he said, played its part in his recommendation for formal initiation of tenure charges. He noted respondent had furnished no doctor's notes in excuse and that she lived only two blocks from Barringer Prep, a five-minute walk. In conferring with respondent at the end of the 90-day period, he said, he did not believe respondent ever felt she needed help. He, too, informally observed respondent's classes and felt there was lack of structure in the class, poor class management techniques, no order or discipline, and, in short, chaos. P-5 was his memorandum to respondent taking note she was not in classs on December 10, 1987 and that her class was not being covered during her absence by another teacher.

Petrozzino testified he saw no improvement in respondent's performance during the 90-day correction period.

The Board rested.

II

Respondent, Delia Kind, age 39 years, is widowed with one son, 15 years old, at home in the City of Newark, Essex County. She has been employed as mathematics teacher by the Board since 1970. She holds a bachelor of science degree in mathematics from Elizabeth City State University, North Carolina, in 1970. She has pursued masters credits in mathematics at Yeshiva University, Belfer Graduate School, in 1971-73. She has accrued non-matriculating science and education credits at N.J.I.T. and Montclair State College. Under Newark Board of Education in-service training, she has taken courses in mathematics teaching strategy, test-taking and has attended workshops. She holds a New Jersey teachers certificate with endorsement in mathematics 9-12, secured in 1970. She worked a short time at Clinton Place Junior High School and has spent the rest of her work experience at Barringer Annex or Preparatory High School.

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From 1974 on, she said, she got satisfactory evaluations until the school year 1983-84. Her increment was withheld for 1986-87, she said, for excessive absences and for deficient performance in 1985-86. Her attendance before those years, she said, was always satisfactory, averaging only two absences per month, mainly due to illnesses or emergencies.

Her health before 1985-86, she said, was fair. She had surgery in 1982-83 for emergency appendicitis. In 1983-84 she had an emergency removal of a tumor from the head near the frontal region, external and not beneath the skull. It was, she said, outpatient surgery. Afterwards, as a result, she had some problems adjusting, experiencing strange and frightening perceptions, which, she said, no longer exist. Why was she constantly tardy? Respondent said she would often oversleep through her alarm clock and once conferred about the problem with her doctor. After tumor surgery, she said, she had a drastic physical change, losing some 20 pounds and feeling as if she were on drugs. She said she looked drawn. Her doctors told her, however, that she was capable of returning to work and should do so. Thus, she said, she was unable to obtain a leave of absence excuse letter. She said she once was examined by a neurologist and given a brain scan in early 1983. The test was done at Clara Mass Hospital, but respondent said she was never given a medical interpretation of the test. Ultimately, she felt better and returned to work and was able to teach.

She and her husband were divorced in 1977; he died in 1987. She has had custody of her son as a single parent.

Respondent identified R-1 as a recognition award given to her by the department of secondary school programs of the Newark Board of Education on May 21, 1987.

R-2 in evidence was a substitute lesson plan prepared by respondent in the month of September 1987. R-3 in evidence was an updated substitute lesson plan submitted in October or November 1987. R-4 was an updated substitute lesson plan submitted in October or November 1987. R-5 in evidence was a chart depicting updated lesson plans, as of October 19, 1987. R-6 was a substitute teacher's critique of her substitute lesson

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plan dated November 20, 1987, in which the substitute teacher indicated a satisfactory plan. To the same effect was R-7 and R-8. R-8 contained the criticism that the substitute lesson plan should have been "of longer duration." It was dated December 1, 1987. R-9 in evidence was respondent's lesson plans for 1986-87. R-10 was respondent's lesson plan book for 1987-88.

Concerning the matter of pupil conduct in her class during the 90-day correction period, respondent said before she had experienced serious discipline problems with certain criminal elements in her class who constantly played pranks; some carried starter guns and knives. During that 90-day period, however, respondent denied that students ever wandered around her class because, as she said, she had learned a special technique that totally limited the practice in a new teaching strategy. Concerning distribution of texts, respondent complained she had difficulty in getting substitute texts if the texts were lost by students. She said administration did not like to replace lost texts. Her students were not permitted to take assigned texts home, but instead they took only their workbooks home. Respondent said she regularly assigned homework. Regular texts were always kept in the classroom locker for use by her students, mainly for reference. She instructed her students to leave the texts in class because "we can't be sure students would return them if distributed."

Concerning student grades, respondent noted she reported them by scan sheets; there were very few failures. Notice of failures was always given to the students only and not to the parents, except for the last school year.

Concerning students who made requests to leave her class, respondent felt they were beyond the general mathematics level. They should not have been so assigned in her class; she felt the parents did not understand.

Respondent said her absences were because of sickness like colds, headaches or some form of occasional stress.

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DISCUSSION

Tenure charges against respondent comprise, broadly, three counts, the first of which sounds in inefficiency, which, under N.J.S.A. 18A:6-11, requires that the Board before making its determination to certify such a charge shall provide the tenured employee with written notice of a 90-day period for correcting and overcoming the inefficiencies alleged. The rationale is understandable: only if a teacher has been given opportunity to demonstrate correction can he/she effectively rebut the charge. The teacher must be given opportunity to understand the allegations and must be given constructive advice and support during the correction period for assistance. Cf., Rowley v. Board of Ed., Manalapan, 205 N.J. Super. 65, 72 (App. Div. 1985). Here, the 90-day correction period was the first three months of the 1987-88 school year, from September through December 7, 1987. The evidential record is replete with documented efforts by the Board through its administrators to assist respondent. She was afforded neutral observations and evaluations, she was offered administrative leave to observe other teachers whose methods were regarded favorably, she was offered study materials and resources for review, she was frequently called for postobservation conferences with administrators and principals. Respondent's response to all such overtures was negative and disinterested. Ultimately, as principal Petrozzino's letter to the Board on December 10, 1987 (D-3) indicated, all ameliorative efforts by the Board during the correction period failed. Her performance during it dictated the principal's recommendation to proceed with tenure charges of inefficiency. D-4(a-d). The conclusion is inescapable, and I so FIND, that the Board discharged fully its affirmative obligations to help respondent correct inefficiencies.

The second count of tenure charges against respondent, based on the same specifications supporting the first count, charge respondent with incompetency. The charge of inefficiency is to be differentiated from the charge of incompetence. The latter presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency under N.J.S.A. 18A:6-11, would be a useless exercise. Incompetence requires proof that

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the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. Board of Ed., East Brunswick v. Sokolow, 1982 S.L.D.—(December 20, 1982); aff'd, State Board, 1983 S.L.D.—(May 4, 1983); In re Nafash, 1984 S.L.D.—(March 12, 1984) (slip op. at 37). The proofs here amply support, and I so **FIND**, the inference that respondent is incompetent. Again, the documentary record and testimonial evidence is replete with repeated instances of respondent's inability to control or manage her classroom, to plan lessons appropriately, to teach class subject matter appropriately, to deal adequately and effectively with constructive criticism, or even to recognize or acknowledge plainly evident deficiencies over either a short or long-term basis. Though respondent was a pleasant and courteous witness at hearing, her explanations seemed feckless and dispirited, as if she were faced with unchallengeable and unyielding obstacles in the classroom that could not reasonably be expected to be within her power to control, change or overcome.

The third count of tenure charges sounds in specified and general instances of unbecoming conduct, among them numerous and persistent instances of excessive absences and latenesses, all documented in Exhibits A-1, A-4, A-8, A-9, A-10, A-13, A-14, C-2 and C-3. Respondent offered no creditable excuse. Her attendance did not improve during the 90-day correction period. C-2, C-3. Such chronic absenteeism and lateness is itself basis for dismissal. I/M/O Tenure Hearing of Edna Booth, 1985 S.L.D.--(May 13, 1985), aff'd, State Board, 1986 S.L.D.—; aff'd, Superior Court, Appellate Division, unpublished opinion, November 13, 1987, docket number A-3985-86T8 (slip op. at 5-6).

CONCLUSION

Based on the foregoing, I **FIND** and determine that tenure charges against respondent, as specified in the first count (inefficiency), the second count (incompetency/other just cause) and the third count (unbecoming conduct, including excessive absenteeism and lateness) have been fully and fairly sustained by the documentary and testimonial evidence adduced by the Board. I **FIND** and determine, moreover, that respondent's performance during the 90-day correction period for notice of inefficiencies did not improve and indeed worsened, despite more than reasonable and

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sensitive efforts by administrative/supervisory staff to assist her to overcome the inefficiencies alleged. Her PIP for 1987-88 was ignored. The prospect of respondent's continued employment in the district is insupportable. The tragic effect of her incompetence upon students is palpable. One cannot fail to sense poignancy in the many student requests for transfer from her classes. Their pleas were more than just to be transferred; their pleas were to be educated. They may not go unanswered.

Respondent is **REMOVED** from her tenured teaching position in the Board of Education of the City of Newark, Essex County, as of date of final agency head decision herein. Under N.J.A.C. 6:11-3.7(b)(ii), the matter is ordered **REFERRED** to the State Board of Examiners for appropriate consideration.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

August 26, 1988
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 31, 1988
DATE
amr

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF DELIA KIND, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a thorough review of the record, the Commissioner agrees with the findings and conclusion of the ALJ and adopts them as the final decision in this matter. The record clearly demonstrates that respondent's teaching performance from at least 1985 onward was so glaringly deficient that dismissal is warranted. Not only has the Board borne its burden in demonstrating inefficient teaching performance, but also unbecoming conduct as exemplified by her pattern of excessive absenteeism, astronomically high tardiness, failure to follow rules and regulations regarding submission of lesson plans, and failure to respond to constructive criticism in a professional manner. Despite the withholding of her salary increments for 1986-87 based on unsatisfactory performance for the 1985-86 school year and numerous efforts by the administrative and supervisory staff to assist in her improvement, respondent has exhibited no likelihood of bringing her poor performance to a satisfactory level; thus, incompetency is also deemed to have been proven. Sokolow Tenure, East Brunswick, 1982 S.L.D. 1358, aff'd State Board 1983 S.L.D. 1645

Accordingly, respondent is dismissed from her tenured teaching position in the City of Newark School District as of the date of this decision. Moreover, the matter shall be transmitted to the State Board of Examiners for its review pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 11, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8003-87
AGENCY DKT. NO. 319-10/87

WILLIAM LOVE, NICHOLAS BURKE, ARTHUR PAGE, STANLEY PATYKULA, GLORIA GIBSON, JEANNE PEARSON, THOMAS MITCHELL AND CLIFFORD ZDANOWICZ,
Petitioner,
V.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Russell J. Schumacher, Esq., for petitioners
Gregory G. Johnson, Esq., for respondent (Lemuel H. Blackburn, Jr., attorney)

Record Closed: June 30, 1988 Decided: August 26, 1988

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE

Petitioners, school administrators designated as "confidential employees" (N.J.S.A. 34:13A-3g) in the employ of the Board of Education of the City of Trenton (Board), alleges, among other things, that the Board's action to unilaterally rescind a Memorandum of Understanding adopted on August 31, 1976 was arbitrary,

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capricious and unreasonable. Petitioners also allege that the Board is in violation of N.J.S.A. 18A:29-4.3 by its failure to establish and place petitioners on a salary guide.

PROCEDURAL HISTORY

This matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) on December 4, 1987 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 18, 1988 at which, among other things, the Board was granted leave to propound its Motion to Stay these proceedings pending the resolution of its Petition for Scope of Negotiations Determination filed before the Public Employment Relations Commission (PERC) seeking a determination as to the status of its adopted and rescinded Memorandum of Understanding. Subsequent to the submission of briefs of law with respect to the Board's Motion, this tribunal denied the Board's application for a Stay by Order dated March 22, 1988. A subsequent prehearing was conducted on May 6, 1988 at which, among other things, the parties requested and were granted leave to cross-move for summary decision, pursuant to N.J.A.C. 1:1-12.5. On July 29, 1988, this tribunal was advised by counsel for the Board that PERC dismissed the Board's Petition for Scope Negotiations Determination. PERC, in its Order dated July 15, 1988, stated, among other things, that it did "...not have jurisdiction to resolve this dispute since it has not arisen in a collective negotiations context. ..." *City of Trenton Board of Education v. William Love, et als*, P.E.R.C. No. 8905, Dkt. No. SN-88-33 at p. 3. Petitioners filed an Amended Petition of Appeal to withdraw Mark Raivetz as a petitioner and add Thomas Mitchell.

ISSUES TO BE DETERMINED

The issues to be determined by this administrative tribunal are as follows:

1. Whether the Board is in violation of N.J.S.A. 18A:29-4.3 by its failure to establish a salary guide for its confidential administrators?

2. Whether the Board's action to unilaterally rescind its Memorandum of Under standing was arbitrary, capricious and/or unreasonable?

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STIPULATED FACTS

1. Petitioners, William Love, Nicholas Burke, Arthur Page, Stanley Patykula, Gloria Gibson, Jeanne Pearson, Thomas Mitchell and Clifford Zdanowicz, are top-level administrators and employees of the respondent, Trenton Board of Education (hereinafter referred to as "Board").

2. Petitioners have been designated as "confidential administrators" by the Board and are excluded from being members of any collective bargaining unit under N.J.S.A. 34:13A-3(g).

3. Petitioner, Nicholas Burke serves in the position of Executive Director, Academic Programs, Curriculum and Staff Development and was appointed to that position on February 8, 1985. Mr. Burke has been employed with the school district since September 1, 1962.

4. Petitioner, Gloria Gibson, serves in the position of Manager of Food Services and was appointed in that position on September 1, 1985 as a part of reorganization. Ms. Gibson has been employed with the district since October 6, 1969.

5. Petitioner, William A. Love, serves in the position of Executive Director of Operation School Renewal (OSR) and was appointed on July 1, 1984. Mr. Love has been employed with the district since September 1, 1960.

6. Petitioner, Dr. Arthur L. Page, serves in the position of Assistant Superintendent, Pupil and Support Services and was appointed to that position on July 1, 1976 by way of reorganization. Dr. Page has been employed with the district since September 1, 1957.

7. Petitioner, Stanley Patykula, serves in the position of Manager of Buildings and Grounds Department and was appointed to that position on June 2, 1986 by way of reorganization. Mr. Patykula has been employed with the district since September 1, 1964.

8. Petitioner, Jeanne O. Pearson, serves in that position of Director of

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Personnel and was appointed to that position on September 1, 1985 by way of reorganization. Ms. Pearson has been employed with the district since September 1, 1958.

9. Petitioner, Thomas W. Mitchell, serves in the position of Assistant Superintendent/Business Administration, Secretary to the Board and was appointed to that position on July 31, 1981.

10. Petitioner, Clifford Zdanowicz, serves in the position of Assistant Director of Personnel and was appointed to that position on December 12, 1983 by way of reorganization. Mr. Zdanowicz has been employed with the district since September 1, 1959.

11. On October 20, 1987, the Trenton Board of Education voted to rescind a Memorandum of Understanding that was adopted by a previous board on August 31, 1976. This Memorandum between the Board and top-level administrators is commonly known as "The Most Favored Nations Clause". The Memorandum provides:"

> In the absence of any written understanding between the Board of Education and the top-level administrators who are not part of any recognized bargaining unit, and in the absence of any clearly defined or delineated benefits that have been granted to those same top-level administrators in the past, this Memorandum of Understanding (between the Board of Education and the top-level administrators) does hereby clearly define that the fringe benefits (exclusive of salaries) accorded those top-level administrators shall not be any less than those fringe benefits and any other personal benefits accorded to any other employee of the district. Any improvements in fringe benefits as may be developed through bargaining or provided to any other employee will also apply to the top-level administrators.

12. On or about October 22, 1987 the Board Negotiator, Daniel J. Graziano, Esquire sent each administrator a proposed new individual contract covering the period July 1, 1986 through June 30, 1988. The contract provided that each administrator, except the Assistant Superintendents, would receive a 6.5% pay increase for each year of the contract. The Assistant Superintendents were offered a 6.0% pay increase. Each contract also contained the following language:

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BENEFITS

> The _____ (title of the person concerned) shall be entitled to all rights, privileges and benefits afforded to the members of the Trenton Administrators Supervisors Association [and all other benefits to which _____ (he/she) is entitled to as of the date of this contract by virtue of Board policy.] No additional benefits may be granted to Employee except by express agreement in modification of this contract or by inclusion in the Trenton Administrators Supervisors contract. Employee agrees that, effective the day of signing this agreement, the Board resolution attached hereto as Attachment B shall have no force and effect except to define the benefits available to the Employee as of the date hereof.

13. The following persons signed their individual contracts with the Board: C. Peter Mullaney, Assistant Board Secretary, Dr. Pasquale A. Maffei, Assistant Superintendent, Curriculum, Dr. Mark J. Ravitz, Director of Planning Research and Evaluation, Julie D. Thomas, Executive Director of School Operations, and David Shafter, Comptroller.

14. Eight administrators, William Love, Nicholas Burke, Clifford Zdanowicz, Arthur Page, Stanley Patykula, Gloria Gibson, Jeanne Pearson, and Thomas Mitchell have refused to sign their contracts. Subsequently on October 26, 1987 they filed a petition with the Commissioner of Education concerning this matter.

15. Petitioners received the same salaries for the 1986/87 1987/88 school years as they did for the 1985/86 school year. They have received no salary increase or salary increment since the 1985/86 school year.

16. Pursuant to N.J.S.A. 18A:29-4.3, on April 28, 1988 the Board by resolution adopted Salary Guides for its confidential administrators. (See 1987-88 Salary Guides for confidential administrators attached and marked as Exhibit "A"). Also attached is a Salary Increase Comparison Table of confidential administrators marked as Exhibit "B".

17. No Salary Guide was in effect for confidential administrators for the 1985/86, 1986/87 school years.

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By way of Supplemental Stipulation of Facts, the parties agree that:

The petitioners receive the following fringe benefits provided by the Board:

1. Individual and family coverage under the New Jersey Blue Cross Hospital Service Plan and the New Jersey Blue Shield Medical Surgical Plan (14/20) Series) including Rider J and coverage of dependent children to age 25, and Medi-Group.

2. Unlimited Major Medical coverage with Provident Life and Accident Insurance Company. The medical expenses incurred over $2,500 that are submitted to Major Medical shall be paid at the rate of 100%.

3. Full family coverage for employees under Delta Dental Plan of New Jersey N.J. Inc., (50-100 plan) or Dental Services Organization Inc.; no deductible.

4. A full-family $1.00 co-pay prescription insurance plan with oral contraceptives through Blue Cross-Blue Shield.

5. Post-retirement health benefits for any administrator who retires at age 55 or older with twenty-five (25) years of service. Such administrator shall receive the above listed benefits in #1 and #2 until eligible for Medicare.

6. Vacation schedules ranging from twenty (20) to twenty-five (25) days per year.

7. Longevity increments for years of service according to the following schedule:

a. Twenty (20) years - $600.00
b. Twenty five (25) years - 600.00
c. Thirty (30) years - $600.00
d. Thirty-five (35) years - $600.00
e. Forty (40) years - $600.00
f. Forty-five (45) years - $600.00

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g. Fifty (50) years - $600.00

Longevity benefits are not retroactive before July 1, 1983.

8. Automatic placement at maximum step on salary guides with ten (10) years or more of service in the school district and/or seven years in the same job title.

9. Tuition reimbursement of up to $500.00 per year.

10. Stipend of $850.00 given for receiving doctorate degree.

11. Compensatory credit for working holidays, including Christmas recess, Easter recess, snow days, and other times approved by the Superintendent.

12. Eighteen annual sick days, four personal business days, four illness in the family days, and so forth.

13. Payment of association dues for approved professional associations.

The Board entered into a Collective Bargaining Agreement with Trenton Administrators and Supervisors Association ("T.A.S.A."), covering July 1, 1986 to June 30, 1989, granting T.A.S.A. members a 7% pay increase for the 1986/87 school year, and 7.5% and 7% for the 1987/88 and 88/89 school years, respectively. (See, attached Salary Schedules A-D, marked as Exhibit XX).

Pursuant to the rules of the OAL under N.J.A.C. 1:1-12.5 and the New Jersey Supreme Court's holding in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 N.J. 67 (1954), setting forth the criteria for summary judgment, I FIND there exists no genuine issue of material fact and that the herein matter is ripe for summary decision.

THE ARGUMENTS OF THE PARTIES

Petitioner's Position

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At its Point I, petitioners allege that the Board's unilateral rescission of the Memorandum of Understanding was arbitrary, capricious and unreasonable and constitutes a reduction in compensation contrary to the provisions of N.J.S.A. 18A:28-5. (See: para #11, Stipulation of Facts). They argue that the Commissioner previously rule the Memorandum of Understanding to be valid and enforceable in the matter of *Page v. Bd. of Ed. of the City of Trenton*, 1980 S.L.D. 1193. In that case, Arthur Page, a petitioner in the instant matter, obtained an Order by the Commissioner that the Memorandum applied to the basis for salary determinations.

In the matter of *Love et al v. Bd. of Ed. of the City of Trenton*, (decided July 23, 1984), a petitioner herein, was sustained by the Commissioner whereby it was again determined that the Memorandum applied to the Board's method of determining the appropriate salaries for its confidential administrators.

Petitioners argue that the rescission of the Memorandum - a unilateral attempt by the Board to deny the confidential administrators the benefits to which they are entitled - was done in bad faith as the Board has refused to negotiate directly with these administrators. The effect of the Board's action is a reduction in compensation of the confidential administrators in violation of N.J.S.A. 18A:28-5. As the Board's action to unilaterally rescind the Memorandum was arbitrary, capricious and unreasonable, the Memorandum should be reinstated and given full effect to provide the confidential administrators the benefits and salaries to which they are entitled. Petitioners' contend that currently, they are not receiving all of the benefits received by other employees in the school district.

At their Point II, petitioners contend the Board has violated N.J.S.A. 18A:39-4.3 by failing to establish a salary guide for its confidential administrators. Petitioners assert that the Board has a long history of improperly and arbitrarily setting the salaries of its confidential administrators. In the matter of *Contardo v. Trenton City Bd. of Ed.*, (decided March 23, 1984) the Commissioner stated that he "...deplores the inaction of the Board evidenced by its failure to adopt salary schedules for its confidential employees." In *Love*, the Commissioner affirmed the Administrative Law Judge where it was held that there was "utter confusion" as to confidential administrators salaries. Petitioners contend that the Board has refused to negotiate with them and has not employed a representative who has negotiated

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in good faith, throughout the contractual years at issue in this matter, regarding salary.

Petitioners concede that on April 28, 1988, the Board adopted salary guides for the confidential administrators for the 1987-88 year. They argue, however, that no salary guides were established for the 1986-87 or 1988-89 school years. They further contend that the confidential administrators receive the same salary in the 1986-87 and 1987-88 school years as they received in the 1985-86 school year. The salary guide approved by the Board failed to satisfy the statutory requirements of N.J.S.A. 18A:29-4.3 because the adopted guide does not apply to petitioners. As stated in the document marked Exhibit A, the salary guide was made "applicable only to Confidential Administrators who have signed contracts of employment after January 1, 1987." The contracts offered to the Confidential Administrators provide for a 6.5% salary increase for each contract year (6.0% for assistant superintendents). The contract also contained the clause found at paragraph No. 12 of the parties stipulated facts, herein. This clause, petitioners argue, required the waiving of rights to benefits the Confidential Administrators were entitled to under the Memorandum of Understanding. For those Confidential Administrators who refused to waive their rights under the Memorandum and sign a contract for the adopted salary, no salary guide is presently in effect.

Petitioners contend that the contracts offered to the Confidential Administrators provided for salary increases lower than those the Board provided to the members of the Trenton Administrators and Supervisors Association (TASA) whose agreement for the period of July 1, 1986 to June 30, 1989, provides for a salary increases of 7.0, 7.5, and 7.0 percent for the 1986.87, 1987-88 and 1988-89 school years respectively. A comparison of the appropriately established salary guides for members of TASA with those adopted for the Confidential Administrators illustrates the inequitable treatment the Confidential Administrators have received from the Board. Under the TASA salary guide, a high school principal at the top step of the guide receives $60, 855 while an Executive Director, who is only one level below an Assistant Superintendent on the Confidential Administrator guide, receives only $59,701. The inequity of high-level administrators, who cannot form a bargaining unit, receiving less than building principals is clear. To correct such deficiencies, the Board should be ordered to

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negotiate with petitioners and establish salary guides for the 1986-87, 1987-88 and 1988-89 school years which properly reflect the salaries due to petitioners.

At Point III of its brief and argument, petitioners claim that the Board has improperly withheld increments due and owing to them in violation of N.J.S.A. 18A:29-14. They contend that by the Board's failure to establish salary guides and through its failure to offer them contracts for the 1986-87 and 1987-88 school years until October 1987, the Board has improperly withheld increments which were due to petitioners. At no time has the Board taken action pursuant to N.J.S.A. 18A:29-14, to withhold the increments due petitioners or provide petitioners with any reason for withholding of salary increments. Petitioners argue, therefore, that they should be granted appropriate increments retroactively after good faith negotiations between petitioners and the Board.

The Board's Position

The respondent Board contends that it adopted salary schedules for its Confidential Administrators for the 1987-88 school year in compliance with N.J.S.A. 18A:29-4.3. It observes that the statute, N.J.S.A. 18A:29-4.3 requires that each local board of education shall adopt salary schedules for each school year employing one or more teaching staff members having full-time supervisory or administrative responsibilities. Such salary schedules are subject to the provisions of N.J.S.A. 18A:29-4.1, which permits local boards of education to adopt salary schedules for one, two or three years.

The Board observes that it is uncontroverted that on April 28, 1988, by resolution it adopted salary schedules for its confidential administrators. It contends that the salary schedules adopted are valid and in full compliance with N.J.S.A. 29-4.3. The Board admits, moreover, that there were no salary schedules in effect during the 1985-86 and 1986-87 school years for its Confidential Administrators. It believes, however, that based upon the circumstances set forth herein; i.e., the adoption of its current salary schedule, it is entitled to summary judgment.

At its second point in its argument, the Board contends that its action to rescind the Memorandum of Understanding was legal and proper.

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In support of its argument, the Board observes that the Legislature has granted boards of education the authority to make, amend or appeal rules necessary for the governing and management of the public schools. N.J.S.A. 18A:11-1 et seq. N.J.S.A. 18A:27-4 specifically grants each board of education the authority to make rules governing the employment and salaries of employees.

It is well established that a Board of Education is a non-continuous body whose authority is limited to its own official life whose actions can bind its successors only in those ways an to the extent expressly provided by statute. *Joseph Bolger v. Bd. of Ed. of Borough of Keansburg*, 1979 S.L.D. 94, aff'd. St. Bd. (July 11, 1987) aff'd. App. Div. 1980 S.L.D. 1478; *Robert and Barbara Foote v. Bd. of Ed. of Twp. of Wall and Old Wall Historical Society*, 1977 S.L.D. 462, aff'd. St. Bd. July 6, 1977. Subsequent boards are bound by N.J.S.A. 18A:29-4.3 to perform in accordance with salary schedules with a duration of more than one year.

It is clear that on October 20, 1987 the Board adopted a resolution rescinding the Memorandum of Understanding that was adopted by a previous board on August 31, 1976. It is also clear that the previous board was an elected board and has now been replaced by the current appointed Board. The Memorandum in question exclusively applies to "fringe benefits" conferred upon confidential administrators. When the Board rescinded the Memorandum it also provided individual contracts with the confidential administrators providing for no less fringe benefits then presently received by the administrators. The Board contends that it was not bound to follow the Memorandum, and even if it was valid and enforceable, the Board had the statutory right and authority to rescind it.

In a case similar to the facts of this matter, *Bolger, supra*, the plaintiff superintendent claimed that the defendant board violated N.J.S.A. 18A:29-4.3 when it adopted a parity clause establishing his salary. The parity clause was incorporated in a motion which stated "that in consideration of a 26.995% of a parity above the top administrative guide we hereby employ the superintendent of schools effective Thursday of July 1975 to thirty June 1976." The Commissioner determined that the board's adoption of the parity clause set the petitioner's salary for one year only, and did not establish a salary schedule, and could not be binding on future boards. Id., at page 96.

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The Board requests that this administrative law judge apply the same reasoning in the *Bolger* case to the matter at hand. The Memorandum is not a salary schedule. Since it was not adopted by the present Board it should not be binding. Moreover, the Board properly rescinded the Memorandum.

DISCUSSION AND CONCLUSIONS

The Confidential Administrators herein have been so designated by the Board which, presumably, relies upon the statutory definition found in the New Jersey Employer-Employee Relations Act (Act) where, at N.J.S.A. 34:13A-3(g), it states that:

> "Confidential employees"of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

As a consequence of this statutory provision, petitioners are prohibited from joining or participating in "any appropriate negotiating unit" which is "incompatible with their official duties." Notwithstanding this statutory provision, this is not to suggest that petitioners individually, are precluded from negotiating with the Board on their own behalf. Nor are they prevented from presenting proposals to the Board as a "class" of employees. Moreover, this provision of the Act does not immunize the Board from adherence with those statutes under New Jersey Education Law concerned with employee salary and compensation. The statute at issue here is N.J.S.A. 18A:29-4.3, which provides that:

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to the provisions of N.J.S. 18A:29-4.1. Nothing contained in this section of the act shall authorize a board to pay an amount of salary less than the amount such member would be entitled to under any other law. The

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> schedules adopted pursuant to this section shall be filed with the Commissioner of Education within 30 days after the adoption of each such schedule and the adoption of each subsequent revision of each schedule.

N.J.S.A. 18A:29-4.1 states that:

> A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.

The Board admits that prior to October 20, 1987 it had not adopted salary schedules for its Confidential Administrators as required by N.J.S.A. 18A:29-4.3 This law was enacted under Chapter 364 of the Laws of 1973 and became effective on January 7, 1974. Despite the force of the effective date of the statute, the Board did not comply with the mandate nor did it see fit to comply with the law until some 13 years and 9 months had elapsed. The Board offers no defense to this delay in promulgating the salary provisions required by N.J.S.A. 18A:29-4.3 Rather, it believes that it is entitled to summary judgment based upon its adoption of the current salary schedules for its Confidential Administrators. I disagree.

The record herein clearly demonstrates and I so **FIND** and **CONCLUDE** that the Board was in violation of N.J.S.A. 18A:29-4.3 by its failure to comply with the statute prior to October 20, 1987.

The salary guide adopted by the Board for its Confidential Administrators for the 1987-88 school year is as follows:

CONFIDENTIAL ADMINISTRATORS

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1987-88 Salary Guides

Applicable only to Confidential Administrators who have signed contracts of employment after January 1, 1987. No movement on the guide can occur without the Superintendent's recommendation.

LEVELS

Step	I	III	IV	VI
1	40,955	44,685	49,580	64,032
2	41,910	45,595	50,515	65,339
3	42,870	46,500	51,450	66,672
4	43,755	47,435	52,380	68,033
5	44,765	48,445	53,365	69,421
6	45,775	49,455	54,480	70,838
7	46,785	50,465	55,385	72,284
8	47,845	51,550	56,470	
9	48,955	52,610	57,535	
10	50,015	53,725	58,595	
11	51,180	54,885	59,701	
12	52,836	56,021		

Levels II and V are not in use.

Positions in Level:

I - Assistant Board Secretary

III - Assistant Director
Comptroller
Manager
Director

IV - Executive Director

VI - Assistant Superintendent

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Adopted at Board Meeting On April 28, 1988 (Exhibit A)

There is a presumption that once a board of education has adopted a salary schedule, in accordance with N.J.S.A. 18A:29-4.3 it shall be implemented. In the instant matter, however, the Board has set a restriction on the implementation of its Confidential Administrators salary guide holding that it is "Applicable only to Confidential Administrators who have signed contracts of employment after January 1, 1987. ..." The salary schedule is either in full force and effect or it is not. For example; an employee classified as a Director (III) who has 12 years experience in the Board's school district is entitled to an annual salary of $56,021 for the 1987-88 school year. Under the Board's theory, if the Director has not signed a contract of employment after January 1, 1987, the employee is not entitled to the adopted annual salary of $56,021. This would apply to other employees who, presumably, have acquired a tenure status with the Board; i.e., assistant superintendent. Applying this analysis, I **CONCLUDE** that the Board has failed to fully implement a salary schedule for its Confidential Administrators as required by N.J.S.A. 18A:29-4.3.

The issue now for determination is whether, under the circumstances of this matter, the Board's action to unilaterally rescind the Memorandum was arbitrary, capricious and/or unreasonable? The collateral issue is; given the fact that PERC has denied jurisdiction to hear and determine the Scope of Negotiations petition advanced by the Board, whether the instant matter is justiciable before the Commissioner of Education as arising under school law?

In the absence of an N.J.S.A. 18A:29-4.3 salary schedule for its Confidential Administrators, the Board has relied, in part, upon its Memorandum of Understanding as a basis for compensation to this class of employees. *Page*, *supra*. at 1212. The Memorandum has been in effect since its adoption by the Board on August 31, 1976. The Board has also used the collective negotiated agreement between it and the TASA as a basis for adjusting the salaries for certain members of this class, in compliance with the Memorandum. Id. at 1212. Moreover, the Commissioner has recognized the application of the Memorandum as the basis for determining the salaries of the Board's confidential employees, *Page*, *supra*.; *Love*, *supra*., notwithstanding the Commissioner's frustration at the Board's failure to

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comply with the law and adopt a salary schedule for the Confidential Administrators. *Contardo, supra*.

Based upon the foregoing discussion I **FIND** and **CONCLUDE** that the issue of the Memorandum of Understanding for Confidential Administrators, agreed to between the Board and petitioners, is cognizable before the Commissioner and that the Commissioner has subject matter jurisdiction by virtue of its incorporation under Chapter 29 of Title 18A, the Compensation section of the Education Law.

In the matter of *Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n.*. 78 N.J. 1 (1978), the Supreme Court of New Jersey said at 48 that it is:

> A settled principal of private sector law under the LMRA (Labor Management Relations Act, 29 U.S.C. § 141 et seq.). that an employer's unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining concerning the affected conditions constitutes an unlawful refusal to bargain, since such unilateral action is a circumvention of the statutory duty to bargain. *NLRB v. Katz*, 369 U.S. 736, 743-47, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962); *NLRB v. J.P. Stevens & Co., Inc., Gulistan Div.*, 538 F.2d 1152, 1162 (5th Cir. 1976).

The *Galloway* Court continues to say that "unilateral" refers to a change in the employment conditions which have been implemented, without prior negotiations. The Court observes that the basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during the delicate negotiation period and until new terms are arrived at by agreement. "Unilateral changes disruptive of this status quo are unlawful because they frustrate the 'statutory objective of establishing working conditions through bargaining' " *NLRB v. Katz, supra*. 369 U.S. at 744. Id. at 48.

With respect to the public sector, the *Galloway* Court observed that the New Jersey Legislature also recognized that the unilateral imposition of working conditions by the employer is the antithesis of the Legislature's goal that terms and conditions of public employment be established through bilateral negotiations. The Court, in footnote 9 said, in part, that:

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> We note that by its express terms, the statutory proscription of any unilateral implementation of a change in any of the terms and conditions of public employment is not limited in its applicability to the period of negotiation for a new collective agreement. Rather, it applies at all times and is thus more expansive than the *Katz* rule. ... (citations omitted) Id. at 48-49.

Thus, by statute (N.J.S.A. 34:13A:5-3) and court rule, the unilateral actions by an employer to change the working conditions or status quo without prior negotiations are unlawful because they frustrate statutory objectives of establishing working conditions through bargaining. *Galloway supra; Katz supra*. Here, in the absence of a negotiating unit representing the Confidential Administrators, the Board, through its agents, has forwarded to the individuals of this class a written contract to be executed by the employee without the benefit of negotiations (See: Stipulation of Facts, para. #12). The Board's employment contract modifies the benefits to which the Confidential Administrators have been eligible and receiving under the Memorandum, again without the benefit of negotiations. Moreover, the Board's adopted salary policy, incorporated into the contract, has the effect of coercing the individual Confidential Administrator to execute the document by its language where it states that the 1987-88 salary guide is "applicable only to Confidential Administrators who have signed contracts of employment after January 1, 1987. ... ." (Exhibit A) This statement together with Stipulation of Facts, paragraph #12 does not appear to comport with the statutory objective of establishing working conditions through bargaining. *Katz, supra.; Galloway, supra*.

I **CONCLUDE**, therefore, that the Board's action to unilaterally rescind its Memorandum of Understanding for Confidential Administrators, which formed the basis, in part, for compensation for this classification of employees, was arbitrary and unreasonable under the circumstances of this matter.

I further **CONCLUDE** that pursuant to statutory and case law, the Board's action is hereby declared ultra vires and, therefore, void.

Accordingly, summary decision is hereby **DENIED** to the Board and **GRANTED** to petitioners.

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ORDER

The Board of Education is hereby **ORDERED** to restore those benefits denied to its Confidential Administrators who have and have not signed employment contracts for the 1988-89 school year, pursuant to its Memorandum of Understanding.

The Board is further **ORDERED** to immediately implement an adopted salary schedule for its Confidential Administrators.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

26 August 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

8/30/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

Aug 31, 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

dho

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WILLIAM LOVE ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review of the record, the Commissioner adopts in part and rejects in part the recommended initial decision in this matter for the reasons which follow.

The issues set down by the administrative tribunal are set forth as follows:

1. Whether the Board is in violation of N.J.S.A. 18A:29-4.3 by its failure to establish a salary guide for its confidential administrators?

2. Whether the Board's action to unilaterally rescind its Memorandum of Understanding was arbitrary, capricious and/or unreasonable?

The Commissioner will address these issues and those sub-issues which flow from them, seriatim.

As to issue one, the Commissioner is well aware that from January 7, 1974 until April 28, 1988 the Trenton Board of Education was in flagrant violation of N.J.S.A. 18A:29-4.3, which requires every board of education in this state to adopt a salary schedule for full-time teaching staff members with supervisory or administrative responsibilities. See Peter Contardo v. Board of Education of the City of Trenton, decided by the Commissioner on remand, March 23, 1984, aff'd State Board August 8, 1984 ("The Commissioner deplores the inaction of the Board evidenced by its failure to adopt salary schedules for its confidential employees." Slip Op. at p. 19). Although their petition was filed fully four and a half months before the action of the Board correcting the matter, petitioners do concede that the Board has now complied with the Commissioner's directive as stated in Contardo to establish said schedule. Notwithstanding such action, another issue has arisen as a result of that salary schedule, specifically, whether the Commissioner has jurisdiction to adjudicate the controversy that has developed between the parties based on the Board's including in the peti-

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tioners' individual contracts terms which would abandon the Board's Memorandum of Understanding, the "most favored nations clause," it has had with its confidential employees since 1974. To resolve this sub-issue the Commissioner must consider first the term "confidential employee" and, thereby, those who come before him now as petitioners, the "confidential employees" in the Trenton School District.

The Commissioner notes initially that N.J.S.A. 18A:29-4.3 plainly states:

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year***. (emphasis supplied)

The Commissioner further notes that "teaching staff member" is defined in N.J.S.A. 18A:1-1 as follows:

> [A] member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse. (emphasis supplied)

When a statute is clear, its intent must be determined from the express language. Jacobs v. Great Pacific Century Corp., 197 N.J. Super. 378 (Law Div. 1984) The Commissioner observes, however, that some of the petitioners in this matter are not teaching staff members according to the statutory definition. Thus, those confidential employees who do not hold valid and effective certification, appropriate to his or her office, position or employment, issued by the State Board of Examiners, are not required to be placed on a salary scale pursuant to the dictates of N.J.S.A. 18A:29-4.3, although the Board is not precluded from doing so. Thus, the Commissioner makes no comment about their status as confidential employees, nor does he pass judgment in any way on their bargaining position with the Board. Since none of these confidential employees are members of any recognized bargaining unit, they may individually negotiate with the Board as each sees fit. Accordingly, the Commissioner finds that prior to April 28, 1988, the Board was in violation of N.J.S.A. 18A:29-4.3 by its failure to comply with the statute prior to that date, but only concerning those petitioners whose administrative duties oblige them to hold appropriate certification. In so finding the Commissioner modifies the ALJ's conclusion pertaining to this issue as found in the initial decision, ante.

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Moreover, while those certificated members among petitioners are entitled to the benefits of N.J.S.A. 18A:29-4.3, that is, to be placed on a salary schedule, the Commissioner does not recognize the use of the term "confidential employees" or any other identity among this group of petitioners except that they are certificated administrators in the Trenton Board's employ. The term "confidential employee" is one found under PERC law and concerns those who may not be members of a bargaining unit where their interests in negotiating the terms and conditions of employment contracts may conflict with other staff members. Since the terms and conditions of employment contracts are an area of law strictly confined to PERC, the Commissioner will not venture into an area where he is without jurisdiction to speak. Thus, he makes no comment whatsoever as to whether the Board shall bargain with petitioners. Had petitioners chosen to ally themselves as a recognized bargaining unit before PERC, they might well have. Similarly, they might have chosen to join TASA. They decided not to apparently. Since they have elected neither path, the Commissioner of Education's jurisdiction provides no authority to compel the Board to bargain with them as a unit.

In this regard, the Commissioner rejects the language contained in the initial decision at pages 16-17 which speaks to NLRB and PERC case law as being inapposite to the instant matter. He also rejects such language and the ALJ's conclusions relating thereto in evaluating the viability of the Memorandum of Understanding. The Commissioner concludes that he need only consider the issues herein related to salary, in establishing whether the "most favored nations clause" of the Memorandum of Understanding shall be incorporated in the Board's salary schedule for petitioners who are properly certificated as administrators in the Trenton School District.

With these limitations of jurisdiction established, the Commissioner will now consider the second issue raised in the Prehearing Order, that is, whether the Board's action to unilaterally rescind its Memorandum of Understanding was arbitrary, capricious and/or unreasonable? The Commissioner concludes it was not for the reasons which follow.

The Commissioner's careful and independent review of the record, which includes an exhaustive review of the series of cases brought before him over the years pertaining to the Memorandum of Understanding, including Arthur Page v. Board of Education of the City of Trenton, 1980 S.L.D. 1193, aff'd St. Bd. 1981 S.L.D. 1468; Contardo, supra; and William H. Love et al. v. Board of Education of the City of Trenton, decided by the Commissioner July 23, 1984, aff'd in part/rev'd in part State Board February 6, 1985 convinces him that the Memorandum of Understanding is, by its nature, a Board policy, which is subject to rescission by the Board at any time. N.J.S.A. 18A:11-1 et seq.; N.J.S.A. 18A:27-4. Because a board of education is a noncontinous body, and notwithstanding the fact that subsequent boards are bound to follow the prescriptions of N.J.S.A. 18A:29-4.3, the Board herein was within its power to rescind the Memorandum of Understanding that had been in effect in the district

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since 1976, in that there is no evidence that the memo is either a formal agreement collectively made with petitioners or an individual contract made with the individual petitioners. Therefore, it is an adopted policy within the Board's power to make pursuant to N.J.S.A. 18A:11-1

> for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes***.

Therefore, as such, the memo is subject to revision or rescission by the Board itself, so long as the policy was rescinded in accord with the Board's own procedures for the adoption or rescission of its policies. Since it is not argued by petitioners that the procedure by which such policy was rescinded was flawed, the Commissioner finds and determines that the Memorandum of Understanding is no longer in effect in the Trenton School District and, thus, petitioners' arguments related to application of said policy are made moot. The operative benefits in compensation due petitioners are the salary schedule adopted for these individuals on the one hand, and the individual contracts negotiated between the individual petitioners and the Board.

In so concluding, the Commissioner must reject the ALJ's conclusion as found in the initial decision, ante, wherein he states "***the Commissioner has recognized the application of the Memorandum as the basis for determining the salaries of the Board's confidential employees, Page, supra; Love, supra***." A careful review of Love et al. which was decided July 24, 1984, four years after Page, reveals that the Commissioner decided Page not as granting a salary adjustment to those petitioners, but rather as bestowing a fringe benefit consonant with the Memorandum of Understanding and a similar fringe benefit conferred on the custodial staff. The ALJ found, and the Commissioner adopted, the following interpretation of the Board's previous actions in construing the language of the "most favored nations clause":

> The Board argues that, if the "most favored nation" clause applies, this case turns on whether the benefit to which petitioners claim entitlement is to be characterized as a fringe or personal benefit on the one hand, or salary on the other. I note that the provision of the custodians' contract involved is contained in the seniority article of that contract, not the salary article. The petitioners urge that this means the parties themselves intended this to be a fringe benefit.

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> This apparent understanding of the parties to the contract seems consistent with the general tenor of the Memorandum of Understanding which, by its language, excludes from its operation the administrators' salaries inasmuch as the Board retained unto itself the right to decide, on an annual basis, what the raises for these personnel should be. No petitioner has contended that he or she should receive a salary adjustment of, say, nine percent in any given year merely because such an increase was negotiated for the benefit of a recognized bargaining unit for that year.
>
> This is not the same as a seniority provision which bestows a longevity benefit by reason of years served in the district. The latter is a fringe benefit, that term being simply some benefit over and above the base salary.
>
> Page v. Trenton Board of Education, above, granted relief to the petitioner therein including "all monies, by way of salary or otherwise to which he would have been entitled as an assistant superintendent since July 1, 1976 and which have not previously been paid him. This includes salary, stipends, military pay, etc." (Ibid. at 1218). As recited above, the administrative law judge found, and the Commissioner agreed, that the "most favored nation" clause contained in the Memorandum of Understanding provides that the confidential administrators are to receive fringe benefits in no case less than those accorded to any other employees in the district. In 1976, the Board adjusted the salaries of Mr. Walker and Dr. Maffei in accordance with the "30 and 7" clause in the TASA agreement. Subsequent to that action, the Board agreed with the Trenton Custodians, in a contract effective July 1, 1979 through June 30, 1980, for employees covered by that contract to go to maximum pay after having ten years or more in the system. The administrative law judge and the Commissioner agreed that the Memorandum of Understanding made applicable the ten years or more of service portion of the school custodians' contract to the confidential administrators. Therefore, as of the effective date of the custodians' contract, July 1, 1979, Dr. Page was entitled to move to maximum salary for his position. (Ibid. at 1212-13). (emphasis supplied)
>
> (Love et al., Slip Opinion, at pp. 12-13)

Thus, the jump to maximum salary provided Dr. Page was granted as a fringe benefit, flowing from a seniority provision in

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the custodians' contract, not as a salary adjustment, as petitioners and the ALJ in the instant matter would have it be. Because fringe benefits lie within the purview of PERC exclusively, the Commissioner finds and concludes he is without authority to comment on the terms of the petitioners' contract related to any such aspects of their compensation.

Accordingly, the Commissioner adopts only that portion of the initial decision which determines that the Board was in violation of N.J.S.A. 18A:29-4.3 by its failure to comply with the statutory provisions N.J.S.A. 18A:29-4.3 before April 28, 1988 and that portion which finds "that the Board has failed to fully implement a salary schedule for its Confidential Administrators as required by N.J.S.A. 18A:29-4.3" (Initial Decision, ante) for the reasons expressed by the ALJ.

In regard to the Board's failure to fully implement a salary schedule for petitioners, the Commissioner notes that petitioners have refused to sign the individual contracts that would thus make applicable to them the salary schedule because the contracts contain language which makes the contract effective only to those individuals who signed it by a date specified. The Commissioner would make clear to the Board that it is without authority to fail to implement its own statutorily mandated salary schedule for its eligible employees under N.J.S.A. 18A:29-4.3. It is therefore directed to do so immediately. However, the Commissioner would emphasize, particularly in light of petitioners' argument that they will not sign the contract because by its terms they would receive a percentage increase less than another group of employees, that any further benefits other than those required by law, such as health benefits and sick leave entitlement, are subject to individual negotiation between each petitioner and the Board. Petitioner are entitled to only such salary increases as are contained within the salary guide. Any arguments as to whether a principal may earn more than a confidential employee, therefore, are dismissed as being of no moment, as the Commissioner has no authority to remedy such circumstance since to do so would represent an assumption on his part of the right to establish appropriate compensation for Board employees.

Finally, as discussed above, the Commissioner rejects that conclusion of the ALJ's finding that the Board's action in unilaterally rescinding its Memorandum of Understanding for Confidential Administrators was ultra vires and void. He thus rejects the ALJ's grant of summary decision to petitioners and hereby orders the Board to fully implement the salary schedule now in place for the individual petitioners. Petitioners' plea for attorney fees and costs is rejected as being not within the authority of the Commissioner to grant.

COMMISSIONER OF EDUCATION

October 12, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6195-86
AGENCY DKT. NO. 289-8/86

DONALD DONOFRIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Richard D. McOmber, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: May 16, 1988 Decided: September 6, 1988

BEFORE **RICHARD J. MURPHY, ALJ:**

Petitioner Donald Donofrio, a tenured elementary school principal in the Long Branch School District, had originally filed an appeal in August 1986 after the Board of Education had refused to reinstate him to his position after he tried to return from an unpaid medical leave of absence. He has since been reinstated and has received back pay. The remaining issues discussed by this opinion are whether the petitioner was entitled to salary between the period of July 1, 1986, and August 25, 1986, as well as whether the Board of Education was required to move him to the maximum step of salary guide and preserve vacation and sick days for the period of Donofrio's unpaid medical leave period.

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PROCEDURAL HISTORY

Donofrio filed his initial petition on August 19, 1986, seeking reinstatement with all back pay and emoluments, and the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on September 18, 1986. Petitioner was allowed to return to his position as principal on August 25, 1986, but the back pay issue remained and the Worker's Compensation action had been filed. On November 3, 1986, the matter was placed on the inactive list for a period of 90 days pending resolution of the Worker's Compensation case. The period of inactivity was extended for another 60 days on March 24, 1987. The Worker's Compensation decision was made in August 1987 and the matter was rescheduled for a prehearing conference which was held, on October 28, 1987. On November 10, 1987, petitioner moved to file an amended petition of appeal, which was unopposed and filed on November 17, 1987. Because of delay in service of the amended petition respondent's answer was not filed until January 21, 1988. A Prehearing order was issued on January 14, 1988, setting forth the issues and scheduling hearing dates for March 16 and 17, 1988. The matter was heard to completion on March 17, 1988, in OAL's Quakerbridge Plaza Office and petitioner submitted a post-hearing brief on April 25, 1988, with the respondent replying on May 11, 1988. The record was kept open until May 16, 1988, to allow petitioner an opportunity to reply. The day for the release of the initial decision in this matter was extended until September 8, 1988, to allow for additional time for research and consideration of the issues presented.

FACTS

Facts needed to decide the remaining issues are not in dispute. During the 1984-85 school year, petitioner was a tenured principal in the Long Branch School District at level 6, step 11, whose salary was $43,722. On February 4, 1985, he stopped working because of stress-related physical illnesses that he claimed were connected to his work. Donofrio was paid by the Board between February 4, 1985, and March 14, 1985, for sick days and holidays. On March 15, 1985, the Board placed Donofrio on involuntary medical leave and suspended his pay.

Donofrio was examined by a number of physicians, including a psychologist selected by the Board, who concluded in October 1985 that Donofrio was not capable of resuming his duties in the Long Branch school system. He was also seen by Dr. Hector-Corral, M.D., in October 1985, and that physician advised that, though the prognosis was

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guarded, he hoped that Donofrio would be able to return to work within three to five months. On February 19, 1986, the Board met, without notice to Donofrio or attendance by him, and voted to direct the Board Secretary to file an application requesting a disability retirement for Donofrio with the Division of Pensions, which was done on March 7, 1986, by Paul Sparta.

On June 16, 1986, Donofrio advised Mr. Sparta that his doctors had approved his return to full-time employment as principal as of July 1, 1986. He reported to work on that date, but was not allowed to resume his duties because the Board had voted, on June 18, 1986, to extend his unpaid medical leave of absence from July 1, 1986, to September 1, 1986. The Division of Pensions denied the Board's involuntary application for disability retirement on August 11, 1986, on the grounds that Donofrio was not permanently and totally disabled from the performance of his regular and assigned duties. In response to this denial, the Board voted on August 20, 1986, to approve Donofrio's return from medical leave of absence effective August 25, 1986, as principal of the Gregory School. As of August 25, 1986, the Board moved Donofrio to level 6, step 12, on the then-current 1986-87 principal salary guide, which was one step below the maximum step, and restored all benefits. Also in August 1987, a Worker's Compensation claim filed by Donofrio in 1985 was resolved and he was found to be permanently but partially disabled.

The Worker's Compensation decision was not actually received by the Board until January 1988, and negotiations then commenced to compute the amount owed to the petitioner. The Board issued a check for $21,665.25 to cover the period between February 1985 and February 1986, which was acceptable to Donofrio. The Board declined to credit petitioner for vacation days for the period of his absence, and also declined to pay him for the period between July 1, 1986, when he attempted to return, and August 25, 1986, when he was allowed to do so. The Board Secretary, Paul Sparta, testified that the Board had an unwritten policy and a past practice of not allowing movement up the salary steps if a teacher or administrator was absent more than six months in one year. Because petitioner was absent from February 1985 to August 1986, he was not advanced on the salary scale or given credit for vacation days other than those earned in other years. Sparta claimed that the petitioner did not offer evidence to dispute the Board's contention that it had applied this policy of no credit for an absence of more than six months in a number of other instances. Sparta conceded that a situation where a principal was both absent and on Worker's Compensation had not previously occurred, but said that he

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felt the general rule concerning lack of credit for missing over six months should apply. There is no dispute as to the above facts.

There is also no dispute that the Board has an unwritten policy and a past practice of denying movement on the salary scale to teachers absent more than six months in one year.

ISSUES

In light of the petitioner's reinstatement and the financial settlement reached above, the following issues remain to be resolved:

1. Whether the respondent Board was obligated to pay petitioner's salary between the period of July 1, 1986, and August 25, 1986, and whether its failure to do so violated his tenure rights;

2. Whether the petitioner is entitled to movement to the maximum step of the salary guide for the position of principal;

3. Whether the respondent Board was legally obligated to preserve petitioner's step on the salary guide and all vacation and sick days for him as if he were continually employed during the period of his absence while on Worker's Compensation leave.

ARGUMENTS AND CONCLUSION

1. SALARY FROM JULY 1, 1986, TO AUGUST 25, 1986

Petitioner argues that he is entitled to be payed from when he reported to work on July 1, 1986, and that the respondent Board's refusal to allow him to resume work on that date violated his tenure rights. Donofrio notes that at no point has the Board acted to suspend him or bring charges against him under the tenure law. N.J.S.A. 18A:6-10, N.J.S.A. 18A:28-5. Donofrio contends that he was suspended unlawfully on July 1, 1986, and that the Board had not certified tenure charges and thus had no authority to suspend him under N.J.S.A. 18A:6-14.

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The Board's response was that it did not act in an arbitrary, capricious, or bad-faith manner in declining to grant petitioner's request to resume work on July 1, 1986. It cites cases upholding the Board's discretion not to return teachers from leave in a manner that would interfere with the continuity of classroom instruction. Because the Board was awaiting a disability decision by the Division of Pensions and a Worker's Compensation decision concerning petitioner, it claims that it was reasonable to deny petitioner's request to return until those decisions had been received. It further argues that the petitioner was not suspended by the Board's extension of his unpaid medical leave.

I agree with petitioner that he was entitled to resume receiving salary as a tenured principal as of July 1, 1986, when his physician certified that he was able to return to work and he reported to resume his duties. The minutes of the Board's meeting of March 20, 1985 (J-1) noted approval of Donofrio's medical leave of absence without pay for the period from March 15, 1985, through June 30, 1985, "or until certification by his physician that he is able to return to work" (minutes at page 2). As of July 1, 1986, Donofrio was certified as able to resume his duties and therefore had satisfied the only condition placed by the Board on his return. Up until that time, Donofrio had voluntarily remained on unpaid leave and had not attempted to resume his duties or assert his tenured right to his position. When Donofrio was certified as able to return to work and attempted to do so on July 1, 1986, after giving due notice, the Board had the option of preferring tenure charges and suspending him under N.J.S.A. 18A:6-14 or putting him back on the payroll. In the face of petitioner's assertion of his tenure rights on July 1, 1986, the Board cites no statutory or regulatory authority for refusing to recognize those tenure rights, at least to the extent of putting him back on the payroll. I agree with petitioner that the Board's action in denying his request for re-employment was, in effect, a suspension and that he was entitled to all of the procedural protection accorded to tenured administrators. The fact that the Board was awaiting results of its involuntary disability application as well as the outcome of the Worker's Compensation claim may have provided a reasonable basis for refusing to allow the petitioner to resume his duties, but it provided no legal authority for refusing to pay his salary for that period. Accordingly, I **CONCLUDE** that petitioner is entitled to salary for the period between July 1, 1986, and August 25, 1986 when he was medically able to return to work and attempted to do so. See, e.g., Frank Bybel v. Englewood Board of Education, OAL DKT. NO. EDU 4170-83 (Dec. 6, 1983), Comm. of Ed. (Jan. 23, 1984).

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2. PETITIONER'S RIGHT TO SALARY-GUIDED ADVANCEMENT, VACATION DAYS AND SICK DAYS (Issues two and three)

Petitioner argues, with respect to his proper step on the salary guide, that the respondent has deliberately placed him one step behind and has based this action on an unwritten and undocumented practice that has never before been applied to administrators who were absent on a Worker's Compensation leave. On that basis, petitioner maintains that respondent has no "past practice" to rely on and acted arbitrarily and capriciously in denying salary step advancement. Petitioner further argued that the respondent Board was legally obliged to maintain the status quo while he was on Worker's Compensation leave by maintaining his proper step on the salary guide and preserving his vacation days and sick days. Donofrio cites the statute with respect to the continuation of pension contributions for teacher staff members on Worker's Compensation leave, N.J.S.A. 18A:66-32.1, and argues that no benefit is to be subtracted or modified and that petitioner's vacation and sick days should be restored as if he were actually employed during this period in light of the Worker's Compensation decision that his illness constitutes a permanent, partial disability and is work-related. The Board defends its decision to deny Donofrio movement on the salary guide on the basis of past school law decisions supporting the lack of movement due to absence. See, Hussey v. Board of Education of the Town of Westfield, 1976 S.L.D. 1019. Because of Donofrio's absence on unpaid medical leave, the Board argues that there was no performance by him on which to base any movement on the salary guide. As to vacation days and sick days, the Board argues that there are no statues similar to that requiring continuance of pension contributions and, further, that petitioner cited no authority to support the granting of sick days while an employee is out of work. As to vacation, the Board claims that Donofrio was compensated for the two weeks claimed.

I agree with the Board that movement on the salary guide is conditioned on successful performance during the year and **CONCLUDE** that the petitioner is not entitled to advancement to the maximum step. The fact that there may have been no past practice as to administrators out on Worker's Compensation leave does not render the Board's policy in this regard invalid. The Board's actions are entitled to a presumption of correctness and are not to be overturned unless they are shown to be arbitrary, capricious or unreasonable See, Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). Petitioner has

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failed to show that the Board's action in denying him movement on the salary guide was unreasonable, arbitrary or capricious.

As to petitioner's request that the "status quo" be maintained during the Worker's Compensation leave, I agree that the respondent Board should maintain his proper step on the salary guide. The Board did this by moving Donofrio to level 6, step 12, on the 1986-87 principal salary guide, which is one step below the maximum step. As for the granting of sick days and vacation days during petitioner's absence, there is a general proposition that a wrongfully-discharged State employee is entitled to sick leave and vacation time for the period of discharge. See, Eaddy v. Department of Transportation, 208 N.J. Super. 156 (App. Div. 1986). Petitioner in this case was voluntarily placed on unpaid leave and not wrongfully discharged, however, for the period between July 1, 1986, and August 25, 1986, he was, as concluded above, wrongfully excluded from the Board's payroll and prevented from returning to work. Under these circumstances, I **CONCLUDE** that petitioner is entitled to any sick days or vacation days that he would have accrued between July 1, 1986, and August 25, 1986.

I further **CONCLUDE**, however, that Donofrio was not entitled to credit for sick time during the period of his unpaid medical leave on the basis of a number of prior decisions by the Commissioner. See, e.g., Sacharoff v. Board of Education of Glen Ridge, OAL DKT. NO. EDU 8224-87 (Mar. 18, 1988), Comm. of Ed. (Apr. 29, 1988); Partus v. Township of Belleville, OAL DKT. NO. EDU 8260-86 (July 10, 1987), Comm. of Ed. (Aug. 24, 1987); Logandro v. Board of Education of the Township of Cinnaminson, 1980 S.L.D. 1511.

As to vacation days for the period of absence, I note first that petitioner was paid for 13.5 vacation days on September 15, 1985 (J-5) but these days were accrued during the 1983-84 school year to be used during the 1984-85 year. The issue is whether petitioner is entitled to vacation days during the period of his unpaid medical leave of absence. I agree with the respondent Board's position that petitioner had no entitlement to vacation days during the period of his extended unpaid medical leave. Pension contribution payments during such periods are mandated by statute, N.J.S.A. 18A:66-32.1, but this provision does not apply to all terms and conditions of employment, as respondent suggests. There is no similar statute with respect to vacation days and this suggests that the matter is left to the discretion of Boards of Education. The Board's decision in this instance is not to grant vacation days for a period of absence is not unreasonable, arbitrary or capricious and therefore is entitled to the difference.

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Under the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the petitioner is entitled to payment of salary for the period between July 1, 1986, and August 25, 1986, and it is further **ORDERED** that he is entitled to vacation days and sick days for that period of time. It is further **ORDERED** that petitioner's request of relief for a movement to the maximum step on the salary guide for the position of principal and for the granting of vacation and sick days for the period of his unpaid medical leave of absence is **DENIED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Sep. 6, 1988
DATE

RICHARD J. MURPHY, ALJ

9/6/88
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

SEP 9 1988
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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DONALD DONOFRIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, including the initial decision rendered by the Office of Administrative Law and the exceptions to the initial decision filed by petitioner pursuant to N.J.A.C. 1:1-18.4, has been reviewed by the Commissioner of Education.

Two points of exception to the findings and conclusions in the initial decision are argued by petitioner:

POINT I

THE RESPONDENT DID NOT ESTABLISH A "PAST PRACTICE" JUSTIFYING ITS DECISION NOT TO ADVANCE PETITIONER TO HIS PROPER STEP ON THE SALARY GUIDE DURING THE 1986-87 SCHOOL TERM.
(Petitioner's Exceptions, at p. 1)

POINT II

PETITIONER SUBMITS THAT THE RESPONDENT BOARD OF EDUCATION WAS OBLIGATED TO "MAINTAIN" THE STATUS QUO WHILE HE WAS ON WORKMEN'S COMPENSATION LEAVE.
(Id., at p. 3)

Petitioner, in support of his points of exception, argues that the ALJ's conclusions are contrary to his findings in the initial decision and therefore warrant reversal by the Commissioner. Petitioner further argues that the ALJ completely ignored the statutory provisions of N.J.S.A. 18A:66-32.1 which required the Board to maintain the "status quo" while he was on workers' compensation leave. In this regard petitioner claims that the Board was required to advance him on the appropriate step of the administrators salary guide and to credit him with sick days and vacation days during the entire period of his leave of absence as though he were actively employed.

Petitioner totally rejects the Board's claim that it was justified by "past practice" in denying him any advancement on the administrators salary guide during the 1985-86 school year when he was on medical leave of absence covered by workers' compensation.

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It is petitioner's contention that the record establishes that the Board was unable to come forth with its burden of proving that it had formulated any written policy or "past practice" which applied to the denial of advancement on the administrators salary guide in instances in which teaching staff members were not employed between September and February during any given school year. Consequently, petitioner urges the Commissioner to reverse the initial decision and issue a finding and determination that the Board's action in denying him maximum step placement on the administrators salary guide, including credit for sick days and vacation days during the 1985-86 school year, was arbitrary, capricious and violative of the provisions of N.J.S.A. 18A:66-32.1.

The Commissioner, upon review of petitioner's exceptions to the initial decision, is not persuaded that the arguments advanced by him warrant reversal of the initial decision. Contrary to petitioner's assertions, the record establishes to the Commissioner's satisfaction that the Board did have an unwritten policy and past practice of not allowing movement up on salary guide if a teaching staff member was absent more than six months within a school year. The fact that such policy failed to distinguish teachers from school administrators is of no moment inasmuch as it was petitioner's burden and not the Board's in proving that such policy was applied against him by the Board in an arbitrary or capricious manner. The record is barren of proof to that effect in the instant proceedings.

Similarly, petitioner's argument that the Board failed to maintain the "status quo" in denying him advancement on the administrators salary guide and crediting him with sick and vacation days during the 1985-86 school year must also fail. It is noted that in support of this contention petitioner relies on the provisions of N.J.S.A. 18A:66-32.1. The provisions of this statute speak to the mandated requirements of pension benefits which must be paid by the Board to the pension fund when an employee is under workers' compensation. N.J.S.A. 18A:66-32.1(a) specifically requires in part that:

> ***The member for whom the employer is making such [pension] payments, will be considered as if he were in the active service.

The applicability of this statutory provision is specifically limited to required payments to the pension and annuity fund and may not be more broadly interpreted to preserve the "status quo" as petitioner argues herein. Moreover, the term "status quo" does not appear in the wording of the statutory prescription relied upon by petitioner herein. The term "status quo" as defined in Black's Law Dictionary, Revised 4th Ed., 1968, reads in pertinent part:

> The existing state of things at any given date.
> (at 1581)

Given its full meaning with respect to the facts in this matter, "status quo" pertains to the "existing state" of petitioner's employment at the time he was placed on unpaid medical

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leave of absence on March 15, 1985 by the Board. At that time petitioner's salary was at level 6, step 11 and he was compensated at $43,722 for the 1984-85 school year.

There is no indication to the contrary in the record of this matter that the "status quo" of petitioner's vacation or sick days was not preserved by the Board for the 1984-85 school year. What petitioner is arguing, however, is that the "status quo" should not have been preserved by the Board during the 1985-86 school year and that he was entitled to a step up on the administrators salary guide and, further, that he should have been credited with sick days and vacation days for the 1985-86 school year when he was not actively employed by the Board. The Commissioner finds and determines that these arguments advanced by petitioner are totally without merit for the reasons stated in the initial decision as supplemented herein.

Accordingly, the Commissioner adopts as his own the findings and conclusions in the initial decision. The instant Petition of Appeal is hereby dismissed, except for the relief to be granted herein.

COMMISSIONER OF EDUCATION

October 17, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5779-86

AGENCY DKT. NO. 272-8/86

GERARD P. WILLIAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

Harold N. Springstead, Esq., for petitioner (Aronsohn, Springstead & Weiner, attorneys)

Suzanne E. Raymond, Esq., for respondent (Gutfleish & Davis, attorneys)

Record Closed: May 28, 1988 Decided: September 8, 1988

BEFORE **RICHARD J. MURPHY,** ALJ:

Petitioner, Gerard P. Williams, a former Senior Educational Broker in the Englewood Evening Adult High School, was found to be entitled to a Guidance position in the regular high school by the State Board of Education on November 4, 1987. The only issues remaining are the appropriate salary placement for petitioner and retroactive salary, limited by the Commissioner's decision to the date upon which the secondary guidance position for the 1986-87 school year became available. For the reasons set forth below, this opinion recommends that the petitioner be placed on step number four (MA + 30) of the salary guide placement for the 1986-87 school year and be awarded retroactive salary in the amount of $11,491.02.

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PROCEDURAL HISTORY

The early procedural history in this matter was set forth in full in my partial initial decision of May 18, 1987, which is incorporated by reference. That opinion recommended that petitioner was entitled to a regular high school guidance position by virtue of his service as an educational broker in the adult evening school and it was adopted by the Commissioner on June 29, 1987. The Commissioner also directed a determination as to the appropriate salary guide placement for this position and limited retroactive salary to the date upon which the secondary guidance position for the 1986-87 school year became available. Claims to back salary and retroactive salary guide placement prior to the date of wrongful denial of employment were held to be barred by N.J.A.C. 6:24-1.2. The matter was placed on the inactive list on October 21, 1987, pending an appeal to the State Board of Education, which affirmed the Commissioner's decision on November 4, 1987. The hearing to address the remaining issues of salary guide placement and retroactive salary was held in Newark on March 8, 1988, with post-hearing briefs submitted by the petitioner and the respondent on March 15, 1988, and March 21, 1988, respectively. On April 25, 1988, the parties were ordered to submit additional documentation and information to complete the record and this was submitted on May 23, 1988, with the record closing on May 28, 1988, to allow respondent an opportunity to reply. The forty-five day period for submission of an initial decision was extended until September 8, 1988, for additional consideration and research.

FACTS

The parties do not dispute the following facts, although they differ significantly as to the legal conclusion to be drawn from them. Petitioner began work as an Educational Broker in the Englewood Public School Adult Educational Program in 1980 at a salary of $18,000, for eleven (11) months. The position required State certification in student personnel services, a master's degree in guidance and five years' experience in counseling, all of which petitioner possessed. Williams was not placed on the regular teacher salary guide in effect for the 1980-81 school year since he was not assigned to the day school guidance or teaching staff. As an Adult Educational Broker he received $1,636.36 each month in gross salary for an eleven-month period for a total of $18,000. Had he worked on a ten-month basis he would have received $16,363.64 in salary, which falls between the second and third steps for a MA + thirty (30) on the 1980-81 teacher salary scale (P-8). Had he been placed on step three for 1980-81 (and he did not

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timely file and appeal to be so placed at that time) he would have risen to step eighton the 1985-86 salary scale at $23,500 (P-8). For the 1986-87 school year the salary guide was modified by reducing the number of steps from 17 to 11, with a planned decrease to ten steps in 1987-88 and nine steps in 1988-89. The starting salary at step one for MA + thirty (30) on the 1986-87 salary guide was $23,633, and respondent urges this as petitioner's appropriate placement. Williams claims that he should be placed at the top of the scale at step 11, at a salary of $41,000, considering his fifteen years' prior experience, including six years' service as an Educational Broker in the Englewood Adult Evening High School.

Petitioner testified that he worked as an Educational Broker in Englewood from 1980 to June 30, 1986 under an administrative contract, where he received raises on percentage basis (he was unsure of the precise percentage used). In the 1984-85 school year he was paid $25,573, and he was offered $27,619 for the 1985-86 school year, which he refused to accept until his tenure and salary status were resolved. On January 3, 1986, the acting superintendent of schools advised petitioner that his request to be "upgraded" in salary was not favored by the Board and it was suggested that Williams meet with the Board's negotiating committee. In June 1986, the Board eliminated the position of Educational Broker and did not offer Williams employment in the regular day program as a guidance counselor. He applied for such a position but was rejected. Williams detailed his search for equivalent employment in an affidavit of March 17, 1988, and, briefly, in his testimony. His affidavit states that he searched for employment in the summer and early fall of 1986 by answering appropriate ads. He applied for guidance jobs in Boston and New York but received no offers. He finally found work as an guidance counselor at a high school in the Bronx from October 1986 until June 30, 1987, when he was appointed to a guidance position at another high school, where he worked three days until being "bumped" by another licensed counselor. Consequently, he was unemployed between September 13, 1987, and February 29, 1988, when he returned to full-time work in the Englewood schools. In that five-month period of unemployment, he collected unemployment benefits and continued to seek employment as guidance counselor, as detailed on pages four through ten of the statement attached to his affidavit. During this period of unemployment, he did not teach as a substitute, but instead concentrated his efforts on obtaining a full-time permanent position as a counselor, teacher or administrator.

There is no dispute as to the above facts and I so **FIND**.

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The parties have also stipulated, in response to a request for further information made on April 25, 1988, to the following facts:

1. That Mr. Williams's gross pay for three days of work as a guidance counselor in New York on September 9-11, 1987, was $233.94;

2. That Mr. Williams's health insurance premiums during the period of his unemployment were $916.88;

3. That the secondary guidance position for the 1986-87 school year became available on September 1, 1986, and was a ten-month position.

The financial facts as to petitioner's income between September 1, 1986, and February 29, 1988, are not in dispute. For the 1986-87 school year, petitioner received $24,760.04 in salary from another guidance job and unemployment benefits. In the 1987-88 school year (up until February 29, 1988) he received $5,705.94, of which $233.94 was salary and the rest unemployment benefits. Williams also stipulates that he was receiving a salary of $25,573 for the 1984-85 school year and that he rejected an increase to $27,619 for the 1985-86 school year.

ISSUES

The issues remaining to be resolved are:

1. Petitioner's appropriate salary guide placement as a secondary guidance counselor in the day school;

2. Petitioner's back pay entitlement for the full period of the wrongful denial of employment as a secondary guidance counselor from September 1, 1986 .

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ARGUMENTS AND CONCLUSION

(1) SALARY GUIDE PLACEMENT

The Commissioner of Education stated in his decision ordering reinstatement that:

> petitioner is entitled to placement in a full-time secondary guidance counselor position along with such salary, benefits and emoluments attached to that position, less mitigation, effective as of the date the 1986-87 school year guidance counselor position became available . . . because petitioner prevailed in his claim of wrongful denial of employment as a secondary guidance counselor for the 1986-87 school year and because he has been ordered into such position along with back pay, less mitigation, the issues of salary and salary guide placement emerge as collateral issues that must be addressed in order to ascertain petitioner's proper monetary entitlement . . . retroactive salary is strictly limited to the date upon which the secondary guidance position for the 1986-87 school year became available . . . Previous years' service and salary guide placement come into play only insofar as it is necessary to determine petitioner's back pay entitlement for the full period of wrongful denial of employment as a secondary guidance counselor. Any claim to back salary and retroactive salary guide placement prior to the date of wrongful denial of employment is time barred by N.J.A.C. 6:24-1.2 (Emphasis added) (Comm. dec. of June 29, 1987, at pp. 20-21).

Petitioner argues that he is entitled to be placed on step 11 for the 1986-87 school year (at $41,000) and step ten for the 1987-88 school year, at a salary of $44,000. Williams claims that he has fifteen years' prior service which should be considered for placement as of the 1986-87 school year and argues that his seven years of experience should have placed him on step eight on the 1980-81 salary guide at the salary of $17,820. Petitioner stipulates that he received $25,573 in salary for the 1984-85 school year and rejected an offered increase to $27,619 for the 1985-86 school year because he was seeking salary guide placement and tenure.

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The respondent Board argues that petitioner's prior years of service have no bearing on the matter of current placement and that his proper placement for the 1986-87 school year should have been at step one for the MA + thirty (30) at a salary of $23,633 and that placement for the 1987-88 school year should be at step one MA + thirty (30), at a salary of $25,436. (As petitioner notes, this is less than what he was making as an Educational Broker in the 1984-85 school year.) The Board claims that the petitioner is now seeking to turn back the clock to 1980 and renegotiate his initial salary by getting more credit for his prior work experience, contrary to the Commissioner's decision. The Board also notes that Williams accepted his salary placement for six years before filing this petition and may not now rescind that which he agreed to under the pretext that he is a brand new employee. The Englewood Board attacks petitioner's salary calculation by noting that he was previously paid on a twelve-month basis and that he erroneously seeks to apply this to a ten-month job salary scale period.

Under the Commissioner's decision, petitioner is precluded from renegotiating his 1980 salary scale, which is essentially what his request for top-step placement achieves. Under Williams's calculation, his salary would increase almost $15,000 as a result of his placement in a daytime position. This result was not the Commissioner's apparent intent. Nor do I think that, as the Board would have it, the Commissioner intended that petitioner be placed at the first step of his new position. My reading of the Commissioner's decision is that the petitioner should receive an appropriate salary placement consistent with his education and experience, but limited to the fact that he had previously been accepting a given salary from the Board since 1980. In that year, petitioner made $18,000 for an eleven-month job, which translates into $1636.36 a month. Had he been employed on a ten-month basis and placed on the salary guide then in effect (P-8), he would have been close to the third step of the MA + thirty (30) range, which would be $16,550 (his actual salary would have been $16,364). Had petitioner been placed on the third step of the MA + thirty (30) scale in 1980, which is approximately where his actual salary would have landed him, he would have reached the eighth step of the MA + thirty (30) scale in the 1985-86 school year at $23,500. With the compression of steps in the 1986-87 guide (P-10), he would have been placed on the fourth step and would have received $25,433 as a MA + thirty (30). For the 1987-88 school year, he would have received $27,536 on the fourth step. I **CONCLUDE** that the fourth step for 1986-87 at the MA + thirty (30) category is the appropriate placement for petitioner under the guidelines established by the Commissioner's decision. To award petitioner maximum placement on

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that guide would permit him to renegotiate his initial salary placement, which he did not contest for six years and which he is now barred from raising on appeal. Placement on the fourth step for the 1986-87 school year results in a slight decrease in petitioner's salary from the 1984-85 school year, but he choose not to contest his lack of salary guide placement earlier and now is bound by that decision.

(2) MITIGATED BACK PAY

The Commissioner also will allow mitigated back pay for the period during which petitioner was wrongfully denied the guidance counselor position in the day school, beginning on September 1, 1986. Petitioner, relying on his calculated salaries of $41,000 for the 1986-87 school year and $44,000 for 1987-88, claims back pay in the amount of $32,766.26, plus legal interest, pension buy back, and out-of-pocket insurance expenses. The Board of Education claims that petitioner is not entitled to any damages for the 1986-87 school year since he actually earned $26,631.04 (including unemployment benefits for July and August 1986) which exceeds the salary he would have earned during that year ($23,633). For the 1987-88 school year, the Board argues that the petitioner's failure to work as a substitute teacher between September 1987 and February 1988 bars him from receiving back pay for that period. There is no dispute that petitioner earned $24,760.04 in the 1986-87 school year, both as a teacher in New York during the 1986-87 school year, and from unemployment received after September 1, 1986. The Board urges that unemployment benefits received by petitioner in July and August 1986 should be counted in mitigation, even though the guidance position was not available until September 1, 1986. The Commissioner's decision directed determination of back pay only from the date on which the guidance position became available and receipt of unemployment prior to that date is irrelevant to that determination. Accordingly, petitioner's earnings during 1986-87 year which may be considered in mitigation were $24,760.04. In light of the above conclusion that petitioner's salary placement for the 1986-87 school year should have been at step four at $25,433, I **CONCLUDE** that petitioner is entitled to back pay for that year, considering mitigated earnings, of $672.96.

Petitioner also seeks $22,000 in unmitigated back pay for his period of unemployment between September 1987 and February 29, 1988, based on salary of $44,000 at step ten on the salary guide (P-10). Williams received $5,472 in unemployment benefits during this period, as well as $233.94 for teaching three days in September 1987, and thus concedes that any claim of back pay must be mitigated by this income of $5,705.94. The Englewood Board argues that petitioner is entitled to no back pay

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whatsoever for the period from September 1987 through February 29, 1988, because he failed to minimize these damages by seeking professional employment within his certification and, in particular, by refusing to seek substitute teaching assignments. Williams claims that he was willing to accept a position within any of his certifications, but determined that the best course for obtaining permanent employment was a full-time job search. He also notes that he had obtained a full-time position in New York for the 1987-88 school year but was unexpectedly "bumped" out of that position by a guidance counselor with superior rights to the job and thus was suddenly unemployed at the beginning of the school year.

As discussed above, my recommended conclusion is that petitioner Williams should be placed on the fourth step of the MA + thirty (30) scale for the 1987-88 school year at a salary of $27,536. On the basis of that conclusion, petitioner's request for unmitigated back pay of $22,000 for the period from September 1987 through February 29, 1988, must be rejected. Given the salary scale of $27,536, which is a gross salary of $2,754 per month on a ten-month scale, petitioner, at best, is entitled to $16,524 for the six months of his unemployment, which, mitigated by his $5,705.94 in earnings leaves him with $10,818.06 in mitigated back pay. The evidence submitted shows that the petitioner did diligently seek employment after being "bumped" out of his New York State job in September 1987 until he was reinstated to a full-time job in Englewood. Under the circumstances, I reject the Board's argument that petitioner should be denied mitigated back pay because of his failure to seek or accept work as a substitute teacher. Accordingly, I **CONCLUDE** that petitioner, Gerard Williams, is entitled to back pay of $10,818.06 for the period from September 1987 until his reinstatement on February 29, 1988, which, combined with his back pay of $672.96 for the 1986-87 year comes to $11,491.02 in mitigated back pay. I further **CONCLUDE** that petitioner's request for the awarding of interest on this figure is not warranted under N.J.A.C. 6:24-1.18, in that there is no evidence that the Board has failed to satisfy petitioner's claim within the meaning of that rule.

With respect to petitioner's claim for reimbursement of health insurance premiums, I **CONCLUDE** that he is entitled to payment of the full amount of $916.88 paid for this purpose for the period during which he was wrongfully denied a position as a guidance counselor in the secondary school. A teaching staff member wrongfully denied a position should be made whole to the greatest possible extent, including repayment of monies for insurance that, but for the wrongful denial, the staff member would not have had to pay.

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ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the petitioner should be placed on the fourth step of the 1986-87 salary guide a salary of $25,433, and also on the fourth step of the 1986-87 salary guide at a salary of $27,536. It is further **ORDERED** that petitioner be awarded $11,491.02 in mitigated back pay and $916.88 reimbursement for health insurance premiums.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Sep. 8, 1988
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 12 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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GERALD P. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4 and are summarized below.

Petitioner excepts to the ALJ's determination that he should be placed on step four (MA+30) of the salary guide for the 1986-87 school year contending that such determination does not fairly represent his prior experience which was required for the position in the first place, nor does it equate to his most recent salary, and in effect it penalizes him for having the MA+30 when the initial job only required a master's degree.

Petitioner further contends the ALJ erred in reaching backward to the 1980 salary guide in order to determine his present placement and urges that it makes more sense to use a current approach. More specifically, he argues that:

> [Petitioner] received increases over the years and for the 1985-86 school year he was to receive $27,619.00 and $29,829.00 for the 1986-87 school year had the [position] not been abolished. (P-4 in evidence). The salary of $27,619.00 for a 10 month position as opposed to 11 month position would equal $25,108.10 according to the same formula used by the ALJ. This would equate to between Step 10 and 11 on the 1985-86 guide which would place him on Step 5 or 6 of the present MA+30 guide. This would be so even if he received no credit whatsoever for his prior service which was required in the first place. However, the projected increase of $29,829.00 shown on P-4 in evidence would equate to $27,117.00 for a 10 month position. This would equated (sic) to approximately the 6th step on the MA+30 guide for the 1986-87 school year.
>
> Thus even discounting the Petitioner's prior service credits (which it is submitted should be

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> allowed), he would be entitled to placement on Step 6 of the present guide.
> (Petitioner's Exceptions, at p. 3)

Petitioner objects to the ALJ's conclusion that placement on the fourth step for the 1986-87 school year results in a slight decrease in salary from 1984-85, but he chose not to contest his lack of salary guide placement earlier. He asserts that such conclusion ignores the fact he was seeking to obtain guide placement from the Board. As to this, he avows that it was the Board that wrongfully denied him seniority and tenure and abolished his position when he contested his salary guide placement. Thus, he maintains he has been penalized for insisting upon the rights to which he has been entitled.

The Board's reply to petitioner's exceptions emphasizes that petitioner may not now seek to gain credit on the salary guide for service prior to his employment in Englewood. In support of this, it points to the ALJ's unequivocal statement that petitioner is time barred from renegotiating his initial salary six years later as dictated by the Commissioner's decision in the prior matter. The Board rebuts petitioner's suggestion that the ALJ should have used a base salary of $27,619 for the 1985-86 school year for calculating his proper step. It urges that it was proper to go back to 1980-81 and asserts that petitioner rejected the salary offer of $27,619; thus, he cannot now pretend he was paid a salary he never received. The Board also urges that it is irrelevant that petitioner may have possessed qualifications beyond those required by the job.

The Board likewise contends that the ALJ erred in concluding that petitioner should have been placed on Step 4 of the teachers' salary guide for 1986-87 and 1987-88. It argues, inter alia, that the ALJ misread the Salary Compression Guide and erroneously "leapfrogged" petitioner from Step 8 in 1985-86 to Step 4 in 1986-87 when he should have traced his movement horizontally from Step 8 to Step 3 on the compressed guide. Moreover, the Board argues that the ALJ erred in using an 11 month year as a basis for calculation. It urges that Exhibit P-3 indicates the position was a 12 month position with 20 vacation days as his contract was tied to the 12 month union contract between the Board and the administrators. It points out petitioner, like administrators, did not always take his vacation in a block during the summer but sometimes took it at various times throughout the year. The Board also argues that petitioner's testimony at the March 1988 hearing acknowledged he was a 12 month employee with 4 weeks' vacation. No transcripts have been provided to the Commissioner, however.

The Board further argues that the ALJ erred in awarding any damages to petitioner because in 1986-87 he earned by way of mitigation and unemployment benefits $24,760.04 which exceeded what the Board believes his appropriate step should be, namely Step 1 of the 1986-87 guide. It also objects to the award of back pay for the period of time in the 1987-88 school year preceding petitioner's reinstatement, urging that the ALJ should not have found he diligently sought employment.

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Petitioner's reply exceptions urge that his salary for 1985-86 was $27,619 for an 11 month position which, when equated to a 10 month job, equals $25,104 which results in Step 6 (MA+30) of the 1986-87 guide. He counteracts the Board's assertion that he was a 12 month employee by pointing out that perhaps ALJ Murphy found the position was 11 months based on the notice (Exhibit A) which advertised it as such. Lastly, he avers that the Board seeks to conveniently recalculate his salary to place him below Step 1 of the 1980-81 guide despite the Board's own job description requiring at least 6 or 7 years' prior experience which in his mind demonstrates that the Board is continuing to take advantage of him when it should have placed him on guide in the first place.

Upon review of the record and exceptions in this matter, the Commissioner supports the ALJ's conclusion that this matter was not an opportunity for petitioner to renegotiate his initial salary. Thus, prior experience outside of the Englewood District is time barred in this matter as the cause of action over such issue would have occurred in 1980. N.J.A.C. 6:24-1.2; Williams, supra

It is clear that pursuant to the tenure laws petitioner cannot be paid less than he earned as an educational broker since reduction in salary results only from tenure proceedings. N.J.S.A. 18A:6-10 et seq. Proration is necessary, however, because of the movement to a 10 month position.

The Commissioner disagrees with the ALJ's method of calculation whereby he reverted back to the 1980-81 teachers salary guide. To arrive at the proper step for 1986-87 in this matter, it is necessary to take the amount of petitioner's salary for 1985-86, prorate it for a 10 month position, and identify the corresponding step on the teachers salary guide for that year. Thus, the appropriate step for 1986-87 would then flow from that point.

Based on the record before the Commissioner at this time, it is not possible to make an exact calculation because of conflict between the parties as to whether the educational broker position was a 12 month or an 11 month position and whether the salary for 1985-86 was $27,619 or $25,573, because petitioner rejected the increment offered by the Board.

Consequently, this matter is remanded to the Office of Administrative Law to determine whether the position as actually fulfilled by petitioner was a 12 month job. A 12 month job in this matter is one which consists of 11 months' work and 1 month paid vacation. If the job consisted of 11 months' work with no compensation for the 12th month, then it was an 11 month position.

As to the issue of petitioner's salary, the ALJ is directed to hear legal argument as to whether the $27,619 figure is the appropriate figure to use or $25,573.

All back pay is then to be recalculated based on the appropriate proration and salary step determined by the ALJ.

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The Commissioner affirms and adopts as his own the conclusions of the ALJ relating to back pay entitlement in the 1987-88 school year since the record does demonstrate petitioner's suitable efforts to mitigate during that time and he finds meritless the Board's argument he should have accepted a non-teaching staff member position of substitute teacher. Moreover, it is duly noted that on June 29, 1987 petitioner was found to be entitled to a guidance position in the day school program. In August 1987, the Commissioner denied a request of the Board to stay the order for immediate reinstatement to a guidance position and yet it was not until February 1988, three months after the State Board's affirmance of that decision, that the Board complied with the reinstatement order. Thus, the Board is in no position to castigate petitioner's failure to avail himself of employment as a substitute teacher when it failed in its own responsibility to follow the binding orders of the Commissioner.

Accordingly, the matter is remanded to the Office of Administrative Law solely for the purpose of recalculating proper salary guide step placement and back pay. This should be based upon a definitive determination as to whether petitioner's position was a 12 month position or an 11 month position, utilizing the definition provided by the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 18, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1616-88
AGENCY DKT. NO. 6-1/88

IN THE MATTER OF THE TENURE HEARING OF DIANE TAYLOR, SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

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William C. Gerrity, Esq., for the Jersey City Board of Education, petitioner

Sanford R. Oxfeld, Esq., for Diane Taylor, respondent
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: July 27, 1988 Decided: September 9, 1988

BEFORE **ELINOR R. REINER, ALJ:**

PROCEDURAL HISTORY

On or about January 15, 1988, petitioner, Jersey City Board of Education, certified charges of incapacity, incompetence, insubordination and conduct unbecoming a teacher against respondent, Diane Taylor. Respondent filed an answer on March 10, 1988 denying the charges and contending that they should be dismissed. The matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, on March 14, 1988, to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on March 14, 1988.

A prehearing conference was held on April 11, 1988, and a hearing was scheduled

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before the undersigned administrative law judge for June 20, 21, 22, 27 and 28, 1988. Subsequent to the prehearing order, a substitution of counsel for respondent was effected and in view of counsel for respondent's unavailability on June 20, 1988, the hearing was rescheduled to begin on June 21, 1988. Although counsel for each of the parties appeared, respondent did not appear. Respondent's attorney indicated, however, that the address on the notice of hearing was correct as far as he knew, that he had spoken to respondent the week before and reminded her of the hearing, that respondent knew about the hearing, that he had attempted to reach her the day before and on the day of the hearing, but had not been able to contact her. A stipulation of facts was entered into by the parties. Counsel for respondent indicated that he would try to contact respondent and in light of that it was determined by the undersigned that if respondent appeared on June 22, 1988, the hearing would be continued.

On June 22, 1988, respondent appeared and testified on her own behalf. The hearing was concluded on that date. A briefing schedule was established, and the record closed on July 27, the last date for the receipt of reply briefs.

STATEMENT OF THE CASE

The issues as set forth at the prehearing order are as follows:

1. Did the alleged actions of respondent, Diane Taylor, constitute incompetence, incapacity, insubordination and/or conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10?

2. If the charges are found to be true, would such conduct warrant dismissal or reduction in salary or other action?

UNDISPUTED FACTS

As noted above the parties signed a stipulation of facts on June 21, 1988. The stipulation of facts (J-1) with attached exhibits (A through T) comprised petitioner's case. It is

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incorporated by reference and constitutes this tribunal's partial findings of fact. The undisputed facts are as follows:

1. Diane Taylor, respondent, was first employed by petitioner, the Jersey City Board of Education, on September 15, 1978, at School No. 41. Respondent became tenured during the 1981-82 school year, after serving three years and one day.

2. Respondent, at all times, was employed by petitioner as an art teacher under a teacher of art K through 12 certificate.

3. During the 1983-84 school year respondent worked four days a week at School No. 41 and one day at School No. 3.

4. During the 1983-84 school year, respondent was absent 29 days for personal illness (Exhibit A).

5. For the period from September 7, 1983 until September 22, 1983, respondent was on a psychiatric leave under the care of Dr. Alahendra. By memo dated October 11, 1983, Anthony S. Guadiello, supervisor of art, advised James J. Jencarelli, first assistant superintendent/personnel, as to respondent's status and his attempt to have the substitute for respondent during her leave remain to work jointly with respondent. He indicated that when this did not work out, the substitute was terminated (Exhibit B). Guadiello further indicated that he was being kept apprised of the situation by Mrs. Searchwell, principal of School No. 41, who voiced concerns about respondent's class control and teaching methods (Exhibit B).

6. During the 1984-85 school year, respondent was absent from school for 161 days (Exhibit C).

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7. In or about May or June 1984, Claudette Searchwell requested that respondent be involuntarily transferred as a result of her dissatisfaction with respondent's performance, excessive absenteeism and her unacceptable behavior in her interactions with the administration of the school (Exhibit D).

8. Guadiello transferred Taylor to Schools No. 8, 3 and 23. Only Schools No. 41 and 25 had a full-time art teacher. All the other elementary schools had traveling art teachers. Respondent was given a normal assignment.

9. By memo dated September 26, 1984 to Henry Pryztup, superintendent of schools, Jack Schneider, principal of School No. 23, requested respondent's immediate suspension because of insubordination and unprofessional behavior (Exhibit E). He indicated that he had given respondent direction in setting up a trimester art schedule for the school year, and that it was imperative that it be completed on September 14, 1984. Despite his request for the schedule and that she contact him, he alleged that respondent did not comply. The schedules were returned on Thursday, September 20. Errors were discovered in the scheduling and were corrected. He further revealed that on Friday, September 21, 1984, respondent arrived at School No. 23 ten minutes late and signed her arrival time at the school as 10 minutes earlier. When questioned as to why she had not returned Schneider's phone calls, she indicated that she was "too busy." Further, respondent went into a tirade when told about the errors made in the scheduling. She spoke in a loud voice and in an insubordinate and disrespectful manner. Unable to control her ranting and raving, Schneider told Taylor to leave the

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building and report to Mr. Quadiello's office. Schneider alleged that he had never seen such acts of insubordination or unprofessional attitude. He suggested appropriate disciplinary action be taken against respondent (Exhibit E).

10. Dr. Charles Smith is employed by the board as a district-wide principal having curriculum responsibilities and, as Anthony Guadaiello's supervisor, he scheduled a meeting with respondent in response to Mr. Schneider's September 26, 1984 letter to Henry Pryztup (Exhibit E).

11. On October 9, 1984 while at School No. 8 respondent exhibited "bizarre behavior and open hostility" when requested to leave the school to see Dr. Charles Smith. She shouted, "No, I am not going. I want my reps." When the union representatives arrived, she locked herself in her classroom and refused to speak to them. She stated, "I'm being harassed."

12. This incident was memorialized in a letter dated October 10, 1984 from Charles E. Trefurt, principal of School No. 8, and George Juchnewich, assistant principal, to Dr. Henry Przytup, and a letter from J. Juchnewich, assistant principal, to Dr. Przytup dated October 15, 1984 (Exhibit G). The October 15, 1984 letter from J. Juchnewich not only outlines respondent's behavior during this incident, but indicates that respondent's unprovoked outburst of unbecoming conduct has taken much valuable time from other pressing duties and is creating a morale problem within the teaching staff. He recommended that Diane Taylor be suspended indefinitely from her teaching duties at School No. 8 and that another art teacher be assigned as soon as possible.

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13. During the first month of the 1984-85 school year, respondent failed to report for some of her assigned classes and committed other improper actions which led to three memos being written by Mr. Trefurt and Mr. Juchnewich.

14. The first memo dated September 25, 1984, to Ms. Taylor indicated that she was not present at her art class for the entire period of 11:45 a.m. to 12:30 p.m. Her explanation was, "I forgot" (Exhibit H).

15. By letter to respondent dated October 4, 1984, Charles Trefurt and George Juchnewich indicated that respondent failed to report to a scheduled class and that it was necessary to officially reprimand her for missing her assignment. The letter indicates that her pay is to be reduced in accordance with rules and regulations of the board of education and that they recommended that she be suspended from her teaching duties at School No. 8 and be reassigned to another school (Exhibit I).

16. By letter to Dr. Henry Przytup, Trefurt and Juchnewich indicated that respondent had twice failed to report to her scheduled assignment (Exhibit J). The letter indicates that "it is evident that a pattern of deliberate neglect and conscious disobedience has formed." It indicates that respondent's pay is to be reduced in accordance with the rules and regulations of the board of education. It recommends that she be suspended from her teaching duties and reassigned to another school.

17. By memo from Dr. Henry Przytup to Mr. Terrence Matthews, principal in charge of personnel, dated October 1, 1984

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(Exhibit K), Przytup indicated that, "Given the past history and the recent correspondence by the principals of schools 8 and 23 . . .," he was suggesting the suspension of respondent. The memo requests information as to whether it would be proper and legal to suspend respondent for one week without pay or suspend her for one week with pay with the proviso that she seek psychiatric help in order to be given an opportunity to reassess her behavior.

18. By memo dated October 9, 1984, to Mr. Franklin Williams, deputy superintendent, Przytup requested that Franklin Williams move "vigorously" on the situation with respondent because he believed they were dealing with a teacher who "may have emotional problems" (Exhibit L).

19. Apparently, because of the October 9, 1984 incident of locking herself in the classroom, which evidenced emotional problems, respondent was suspended on October 22, 1984, and put on medical leave.

20. Dr. Tabbanor, the school psychiatrist, examined respondent on December 18, 1984, and diagnosed her as being paranoid.

21. On February 20, 1985, Terrence Matthews, chief administrator/personnel, directed Dr. Joseph Skrypski, director of medical services, to reevaluate respondent (Exhibit M). Accordingly, on February 25, 1985, Dr. Tabbanor reevaluated respondent and determined that respondent's psychological symptomology did not preclude resumption of employment. Since respondent was still on leave, Terrence Matthews wrote to her on April 15, 1985, and directed her to report to his office for a teaching assignment (Exhibit N).

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22. Taylor failed to report for her teaching assignment and also failed to report to the medical department on May 14, 1985, as directed. Accordingly, on May 17, 1985, her medical leave was changed to a suspension without pay (Exhibit O).

23. At the beginning of the 1985-86 school year, respondent did not report for work because she was hospitalized at Meadowview Hospital and then Jersey City Medical Center. Respondent was directed to and met with Dr. Tabbanor. Dr. Tabbanor found that respondent's paranoid disorder rendered her "incompetent to resume employment as a teacher." Dr. Tabbanor indicated that he would encourage her continuation in psychiatric supervision including anti-psychotic medications (Exhibit P). Respondent again was placed on sick leave and received as much pay as her accumulated sick leave would allow. Respondent did not teach at all during the 1985-86 school year.

24. During the 1985-86 school year, respondent saw Dr. Rienzo, a treating psychiatrist, on January 24 1985 and August 25, 1986. Dr. Rienzo recommended that Taylor return to work after the August 25, 1986 evaluation. In September and October 1986, Taylor saw Dr. Nazareth, who agreed with Dr. Rienzo.

25. Accordingly, after again seeing Dr. Rienzo on October 8, 1986 and October 14, 1986, respondent was reinstated on November 24, 1986, to schools 34, 39 and 15.

26. Taylor worked without major incident, although on a barely functioning level, until January 8, 1987. On that date, respondent called Anthony Quadiello and stated his name

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over and over with different pronunciations. She stated that kids were animals and adopted a fake southern accent.

27. More particularly, by memo dated January 16, 1987, to Louis Lanzillo (Exhibit Q), Quadiello indicated that respondent said his name (Tony) in many different strange sounds. He kept asking who was on the phone and respondent finally identified herself. When he asked her if everything was okay, she responded by laughing strangely. She said that everything was fine but that the kids were too wild sometimes. When asked how she had managed to get his new telephone number, she laughed strangely and responded that she had been speaking to big elephants. Respondent then said she had to go and make fun of "Dorothy". He mentioned that the police came to School No. 34 on Tuesday, January 6, 1987, to find respondent and give her a ticket, for ignoring a traffic policeman's signals.

28. Taylor also called Louis Lanzillo, the assistant superintendent of schools for personnel, and spoke strangely about elephants. Mr. William Smith, the principal of School No. 15, indicated that respondent was presenting problems there.

29. On January 16, 1987, respondent arrived late for her assignment at School No. 15. Teachers heard her screaming and reported her screaming to Eneas Mulcahy, assistant principal of School No. 15. Respondent was found in the art room screaming that "the school was the pits . . . the children are monkies" . . . and she . . . "couldn't take it any longer." Mulcahy went to discuss respondent's conduct with Smith the building principal. Upon Mulcahy's return to the art room, he found students unattended in the art room and that

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respondent had locked herself in the art room closet. Mulcahy removed the students from the art room, and heard respondent mumbling to herself as he left (Exhibit R).

30. Petitioner did not keep attendance records for respondent until November 24, 1986. From that time, until the end of the school year, respondent was absent 100 days. Including September, October and November of 1986, she was absent approximately 159 out of 180 days (Exhibit S).

31. Respondent was suspended on January 16, 1987, for the incident in which she locked herself in a closet. Since then respondent has not been returned to the classroom and has seen innumerable doctors. She was an outpatient at the Mount Carmel Psychiatric Clinic in Jersey City and on February 5, 1987, was examined by Dr. Nazareth, who stated that she could not function as an art teacher.

32. A chronology of respondent's medical history was prepared by Dr. Crincoli, the acting medical director, on April 1, 1987 (Exhibit T).

33. Petitioner has allowed respondent to utilize all of her sick leave time and even more to allow her to attempt rehabilitation. However, when it was felt that educational services would suffer due to respondent's inability to handle the pressures associated with teaching, the instant matter was instituted. The tenure charges were filed on November 16, 1987.

34. Respondent completed her lesson plan book in a timely manner.

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35. Dr. George Rienzo issued a report to Bruce Leder, Esq., respondent's prior attorney, dated March 8, 1988 (R-2). He first saw respondent on June 28, 1985. He stated that at the time of the interview her affect was flat, her mood dejected and she was suffering from anorexia. He saw respondent on January 24, 1986, and in August 1986 and recommended that she return to work in September 1986. He saw respondent on February 13, and 24, 1987. In March 1987 she was committed to Meadowview Hospital. He saw her in April 1987 and thereafter on a monthly or bimonthly basis. He last saw respondent on March 7, 1988. He indicated that at the time of this interview her affect and mood were good. His report states that "[p]atient still had some anxieties as a result of not being gainfully employed. Patient is very goal oriented and wishes to return to work. There is no suicidal or paranoaic ideations noted. No hallucinations or delusions were elicited. The patient is oriented as to person, place and time. She was cooperative during the interview situation. There was no repetition of speech. Patient answered the questions within the sphere of her knowledge. Her appearance was neat and tidy. The patient was articulate and her speech was well modulated." He stated in concluson that "[a]t the present time, this patient is able to resume her job as an art teacher. In the past it has been noted that many of the patient's anxieties were based on her own inability to return to work. Patient also had familial problems which she did not wish to discuss with board members, as she felt it was an invasion of her privacy."

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TESTIMONY

In an effort to demonstrate that the tenure charges should not be sustained, respondent assumed the stand on her own behalf. She testified that she graduated from Jersey City State College and was first employed in September 1977 as a substitute art teacher. She became a full-time teacher in 1978. She served in the military for two years and six months and received an honorable discharge.

Referring to the 1983-84 school year, she indicated that she had nightmares and could not sleep. She was concerned about her mother's health and thought, while her mother was still alive, that she had passed away. She sought help and later returned to her teaching duties. She indicated that she felt pressured by administrators. Ms. Claudette Searchwell, principal of School No. 41, harassed her. She pulled her into her office and told her that she would have no trouble if she pleased her. Although she ran art shows, which had a good turnout, Searchwell would not leave her alone and was mean to her. She indicated that sometimes she went to the bathroom and cried, but contended it did not interfere with her school day. She alleged that she was required to do work that was outside of her job description and referred to a memo to her from Claudette Searchwell asking her to have some "ATC students work on a special project" (R-1). She indicated that she accomplished it in the one day alloted to her to have it completed.

Referring to Anthony Quadiello, she indicated that he was spoiled and upset that she had a modern classroom. She contended there was nothing wrong with her performance but rather that "they created psychological problems themselves"; Quadiello and Searchwell harassed her.

Referring to the various incidents noted above, and the documents introduced into evidence, respondent testified in the following manner. Admitting that she was out of school 161 days in 1984-85, she contended that she was thrown out of School No. 8 by Charles Trefurt and that Schneider threw her out of School No. 23 (Exhibit E). She contended that this was not fair because she did assignments while other teachers had

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preparation time. She stated that she had not been insubordinate or unprofessional and would not act in that manner. Referring to the contention that she had absented herself from an art class (Exhibit H), she contended that she had shown up and that the classroom teacher told the prinicipal of her absence before she could explain the situation. She claimed that she did not deliberately stay away from the class and would have made up the time at the end of the class. In regard to the memo from Dr. Henry Przytup to Terrence Matthews (Exhibit K) suggesting that she seek psychiatric help, Taylor admitted that she had been seeing a psychiatrist and that the doctor said she should go to work. She did not know why they were harassing her. Referring to the allegation that she had failed to report to a scheduled class on October 3, 1984 (Exhibit I), she indicated that she left while they were taking photographs and rumor had it that Trefurt made the classroom teacher bad-mouth her. When asked about the allegation that she said, "I missed it - you do what you want to do," (Exhibit J), she contended that she would never have said this to an administrator. She claimed it was one thing after another and that "they hurt her." Contending that she did not exhibit improper behavior, she was shocked that Trefurt called her behavior "bizarre" (Exhibit F).

Although she recalled being advised to see Dr. Charles Smith, the principal assigned to curriculum/learning instruction, she stated that she did not know who he was and did not go to see him. She recalled that on October 9, 1984, "they" started shouting at her. She stated that it was embarrassing and that she wanted to speak to them in the office. She recalled that Trefurt and Juchnewich chased her down the stairs to catch her and that she locked the door of the classroom until the teachers' union representatives came. When they arrived, she came out. She was told to leave the school and not return to work. Referring to the statement that she used the words "reps," she contended that she would have used the full word, "representatives."

She recalled seeing Dr. Tabbanor and that he did not help her. She felt she had to work and Tabbanor said she could not teach during that period of time. She did not like the part of his report that said she had "fantasies." She believed "it looked like a shady deal." Although she recalled that she was advised to resume her duties on or about April 15, 1985, she indicated that she failed to report for the assignment because her mother

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had died on April 6, 1985. She indicated that she had taken care of her mother and was very close to her. It was very hard for her to pick up the pieces when her mother died and she did not know what to do. She alleged that she was exposed to ridicule and that Terrence Matthews made "statements to her."

In further testimony, she indicated that her brother and sister were jealous of her. They put her in Meadowview Hospital in Secaucus for one or two months and it made her condition worse. She was on Haldol and her speech became slurred. She went to Mount Carmel Guild for assistance. She indicated that she did not return to work in September 1985 because she was not allowed to and did not teach for that school year. The situation became worse because "people became more competitive."

She explained that her sister, who associates with addicts and criminals, gave the key to the house to her boyfriend and that he had beaten respondent. According to Taylor, her sister's boyfriend punched her in the lip and she then needed plastic surgery. She tried to file an assault charge against him. She further contended that her sister "did her dirty" during the 1986-87 school year. "They" ruined her art and placed her in a hospital where she was trapped in bed for three days. Her sister laughed when the ambulance took her to the medical center.

Referring to the memo from Anthony Quadiello to Louis Lanzillo (Exhibit Q) she contended that it was "terrible." She had not spoken to Quadiello, had not made strange sounds, and had made no comments regarding elephants. She alleged that these are "frames" and that she has been framed since the first day of school. In regard to the police coming to school, she explained that an officer had jumped in front of her car and told her to pull her car to the side. She proceeded to work and could not understand why he left his post and went to School No. 34. She thought it "ridiculous." Referring to Mulcahy's letter to Lanzillo regarding her behavior (Exhibit R), she indicated that she knew nothing about this. She recalled, however, that she did cry at one point and a guard told her to calm down. She contended that it was the same "frame period" and that "it hurts." She denied that she locked herself in a closet, leaving a classroom unattended, but recalled that Dr. Nazareth told her she could not function as a teacher as she was too

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upset. In further testimony, she recalled that she reported to School No. 3 and had no problem there. She indicated that she is presently taking Amitriptyline at night to help her sleep. She takes nothing besides that medication and claimed that it is not an anti-psychotic drug. She contended that she was "tortured" and all she wanted was consideration. She opined that she is now physically and mentally able to teach and would be able to relate to the black children now in the school.

On cross-examination, she referred to her medical treatment. She contended that she has been under treatment with Dr. Rienzo since 1985 and saw him once a month in 1985. She was at Mount Carmel Guild Health Center for six months under Dr. Arla's care and saw Dr. Alahendra prior to that. She indicated that she took Stelazine in 1983 but it did not help her.

In further testimony, she denied that she had an incident with a "bat and a bathroom"; a bat simply flew in the window at her friend's house. She contended that she went to the medical center because she was nervous as a result of what Searchwell did to her. She was confined for a week or two in 1983 which she opined was not good for her. She had to accept the fact that her mother had died. She denied that she was diagnosed as schizophrenic and that she had told Tabbanor that many people were watching her. She admitted that her dreams were "frightened."

She admitted that she was at Meadowview Hospital for two months in July 1985, received medication while in the hospital, and Haldol when she left. In 1986, while under care at Mount Carmel Guild, she was on Mellaril. She contended that they tested drugs on her and it was possible that she took Prolixin. She stated that she was in the program for six months to one year. In further testimony, she indicated that her other hospitalizations were only for testing and not for psychiatric problems. She alleged that she does not get along with her sister and that even her brother knows her sister would steal from her. She indicated that in February 1987 she was committed for two months as a result of her sister's actions and she had no change of clothes. They gave her Mellaril in the hospital which she still takes at night.

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She alleged that Guadiello was prejudiced and that Searchwell harassed her. Although she admitted being sensitive, she claimed they "got ridiculous" and "wanted to frame her." She admitted that she did not get along with Searchwell and Guadaiello, that Schneider ordered her out of the school and that Trefurt did not want her in his school. Referring to the memo from Mulcahy, she indicated that she did not know him. She alleged that "white assistant principals did things to her." She claimed that she had not been raving and ranting on January 16, 1987, and that they had lied. She stated that, "everybody puts a tail on her." She alleged that she did not know Mrs. Chillers (another teacher) and that she had simply been labeled. She did not recall them talking to her about her behavior. When questioned as to whether she hid in the closet leaving the children unattended, she claimed it did not "make sense." Although she alleged that she was in the hallway when she spoke to Mr. McKeon and Eneas Mulcahy, she later alleged that they were "both underneath the table." She alleged that she was told that if the children "cut up" to put them in the auditorium and give them punishment lessons.

DISCUSSION

The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. D.L. and W.R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). The evidence is found to preponderate if it "establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940), (citation omitted). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). One factor that must be considered in a determination as to which party's version of an incident has the "reasonable probability of truth" is that "[t]he interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600,

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608 (App. Div. 1952) (citations omitted), certif. den. 10 N.J. 316 (1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

With this backdrop, I have reviewed respondent's testimony and conclude that it does not help her cause. It does not refute, in any meaningful manner, respondent's record of absenteeism, the incidents found as fact or the psychiatric problems outlined above. Respondent did not effectively dispute the evidence supporting petitioner's action. Although she denied certain incidents as being "ridiculous," she did not present any proof that the acts which are the basis of the complaints by petitioner were not factual. In fact, respondent's testimony served only to support petitioner's allegation of incapacity. Respondent not only testified in a rambling, confused and incoherent manner, but the substance of her testimony was her continuing allegation that the administrators were mean, harassed her, were unfair and out to get her. That being so, her testimony actually served to support petitioner's contention that she exhibited confused and paranoid behavior while functioning as a teacher. In sum, respondent did not show that she had not acted in the manner unbecoming a teacher nor did she demonstrate that she was able to function as a teacher with petitioner board of education.

I must point out at this juncture that I am similarly unpersuaded to the view that respondent is able to resume her job as an art teacher by virtue of the report of Dr. George Rienzo. Dr. Rienzo did not testify at the hearing. Respondent relies on his report dated March 8, 1988, in support of her argument that she is able to return to work. Clearly, Dr. Rienzo's report, obviously prepared for the purposes of this hearing, is hearsay evidence. Although admissible pursuant to N.J.A.C. 1:1-15.5, there must be some legally competent evidence to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). In view of this tribunal's conclusion that respondent's testimony did not serve to refute each ultimate finding of fact, Dr. Rienzo's report, without more, does not constitute adequate proof that the acts alleged by petitioner did

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not occur. At best, it indicates only that in Dr. Rienzo's opinion respondent is not now incapacitated and presently is capable of performing her job duties. It does not speak to the issue of whether petitioner was insubordinate, incompetent or acted in a manner unbecoming a teacher in the past.

The evidence adduced by petitioner which was undisputed, substantiates petitioner's allegation that respondent is incapacitated to perform her duties and has demonstrated incompetence, insubordination and conduct unbecoming a teacher. The incidents outlined above and respondent's employment record reveal that respondent has certain psychiatric problems which interfere with her functioning as a teacher. While there may be times when she is able to function with less difficulty, it is clear from the undisputed facts that for the last number of years, beginning in the 1983 school year, respondent has had psychiatric difficulties which have made her functioning in the school district impossible. It appears that each time she worked in a particular school within the district she had problems which caused the administrator in charge to seek her transfer. She has not only been absent from school in the school years 1983-84 (29 days), 1984-85 (161 days), 1985-86 (she did not teach during that year), 1986-87 (180 days from November 24, 1986, to the end of the year), an excessive number of days, but has demonstrated from her irrational and paranoid behavior that she is incapable of functioning as a teacher responsible for students.[1] She has left students unattended on occasion, has ranted and raved, and has exhibited bizarre and hostile behavior.

Petitioner has attempted to deal with respondent's problem and has given her the opportunity to correct her psychiatric difficulties. Unfortunately, it has been to no avail. Respondent has been under treatment by various psychiatrists and has been institutionalized on several occasions. Although she has attempted to function within the school district, and apparently would like to do so, she is unable to function in the proper and necessary manner on any sustained basis. That being so, I **CONCLUDE** that the preponderance of the evidence substantiates petitioner's contention that respondent is

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1 Since respondent is incapable of functioning as a teacher, the cases cited by respondent which deal with excessive absenteeism are inapposite.

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unable to function as an art teacher within petitioner district. I **CONCLUDE** that the charges of incapacity, incompetence, insubordination and conduct unbecoming a teacher are sustained.

ORDER

It is hereby **ORDERED** that respondent be dimissed as a tenured employee of petitioner.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

September 9, 1988
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Sept. 12, 1988
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 13 1988
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

jrp/am/e

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IN THE MATTER OF THE TENURE	:	
HEARING OF DIANE TAYLOR, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF JERSEY	:	DECISION
CITY, HUDSON COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon independent review of the record in this matter, the Commissioner concurs with the ALJ's findings and conclusions relative to the tenure charges certified by the Jersey City Board of Education and adopts them as the final decision in this matter. The record establishes that the charges of incapacity, incompetence, insubordination and conduct unbecoming a teacher have been proven by a preponderance of the credible evidence.

Accordingly, respondent is dismissed as a tenured employee in the Jersey City School District as of the date of this decision for the reasons well expressed in the initial decision. Moreover, the matter is referred to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.7.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 20, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1617-88
AGENCY DKT. NO. 21-2/88

BOARD OF EDUCATION
OF THE CITY OF NEWARK,
Petitioner,
v.
MARY BURNSIDE,
Respondent.

Carolyn Ryan Reed, Associate Counsel, for petitioner
(Hilda Burnett, Acting General Counsel)

Irving C. Evers, Esq., for respondent
(Giblin and Giblin, attorneys)

Record Closed: August 9, 1988 Decided: September 9, 1988

BEFORE **JOHN R. TASSINI,** ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Newark ("Board") filed tenure charges against the respondent, a special education teacher, and suspended her without pay. The Board demands the respondent's dismissal alleging incompetence and unbecoming and/or unprofessional conduct. See, N.J.S.A. 18A:6-10.

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The respondent denies the charges, but submits that, if the charges of unbecoming and/or unprofessional conduct are proven, some penalty less than dismissal should be imposed.

PROCEDURAL HISTORY

By its letter dated December 18, 1987, the Board notified respondent that tenure charges were filed against her for "(1) inefficiency/incompetence and (2) unbecoming and unprofessional conduct...." The letter also notified respondent of her right to submit evidence in opposition to the charges and her right to appear at a hearing on the charges when the Board would determine whether to certify and forward the charges to the Commissioner of Education ("Commissioner"). See, N.J.S.A. 18A:6-10, 11.

By its letter dated January 27, 1988, the Board notified respondent that, following its deliberations on January 26, 1988, it had decided to certify the tenure charges against her to the Commissioner and that the Board had also suspended respondent without pay pending final disposition of the matter. Copies of the Board's Resolution, the Certificate of Determination, the tenure charges, and the statements of evidence were also served upon respondent by way of the January 27, 1988 letter. See, N.J.S.A. 18A:6-14, -15.

On February 3, 1988, the Board's resolution, the certificate of determination, the tenure charges, and the statements of evidence were filed with the Commissioner. The tenure charges showed as their bases: "1. inefficiency/incompetence, 2. unbecoming conduct and unprofessional conduct." Thereafter, the respondent's answer and defenses were filed with the Commissioner.

The matter was transmitted by the Commissioner to the Office of Administrative Law ("OAL"), where on March 14, 1988, it was filed as a contested case. N.J.S.A. 52:14F-1 et seq.

Following a conference with the attorneys on April 27, 1988, I entered a Prehearing Order in the matter.

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The matter was heard and testimony was taken on July 19, 22, and 25, 1988, in the OAL's Newark office.

It is noted that respondent moved, following the completion of the Board's case, for an order that the Board not be permitted to base its tenure charges on "inefficiency" because the Board failed to provide to the respondent written notice allowing 90 days in which respondent could correct and overcome the inefficiency, as required by N.J.S.A. 18A:6-11. The Board did not oppose respondent's motion and therefore I **CONCLUDE** that inefficiency cannot be a basis for respondent's dismissal.

Posthearing briefs were filed in the OAL by the respondent on August 4, 1988, and by the Board on August 9, 1988.

FACTUAL DISCUSSION

I. The following **FACTS** are not disputed:

Since 1974, respondent has been a teacher in the Board's school system.

In 1974, respondent began teaching at the Thirteenth Avenue School, from which she was transferred.

In 1980, respondent began teaching at the Camden Middle School, from which she was transferred.

In 1984, respondent began teaching at the Arlington Avenue School, where she remained until 1988 when she was suspended.

Once in 1980 and numerous times from 1985 to 1987, the respondent was the subject of memoranda and Teacher Observation Reports prepared by her superiors. (See, B-33, B-31, J-11, J-12, J-10, B-29, B-25, B-20, B-19, B-18, B-16, B-12, J-7, B-9, and J-4.) In these respondent was described as unable to control and educate her students, despite

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conferences and suggestions by her superiors. For example, in the 1985 to 1987 period, it was reported that respondent's students complained that respondent's manner of speech was difficult to understand; that respondent made insulting and degrading remarks about her students in their presence; that respondent's students argued in the classroom with one another and with respondent and vulgar words were used in these arguments by respondent and her students; that respondent's students left her classroom and interrupted other school activities; and that respondent's students engaged in fighting in the school.

In 1984, respondent's superiors provided her with a "teacher trainer," although it was unusual for a teacher teaching as long as respondent to need this help. Respondent's superiors provided her with copies of the observation reports and memoranda and conferred with respondent. Her superiors also suggested to respondent ways to motivate and educate her class. For example, it was suggested that respondent modify her speech so it would be easier to understand; that respondent develop and enforce rules of behavior with input from her students; that respondent utilize audiovisual teaching aids; that respondent keep an orderly plan book and records; and that respondent meet with her students' parents.

Her superiors reported that respondent was not able to improve her performance. For example, they reported that respondent's loss of control of her students had continued; that respondent could not locate her plan book during observations of her performance; and that respondent failed to submit end-of-the-school-year grades for her students. Also, respondent threatened to walk out of her class and, on more that one occasion, did walk out of her class, without notice to her superiors, so that substitute coverage could be obtained.

Respondent's Teacher Evaluation Reports for the 1984-85, 1985-86 and 1986-87 school years were all unsatisfactory. (See, B-23, J-6 and B-3.) Following the 1986-87 school year, her principal recommended tenure charges and suspension without pay.

Based upon the numerous unsatisfactory reports of her superiors, by its letter dated January 27, 1988, the Board notified respondent that she was suspended without pay.

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II. The following is a summary of **FACTS** established in testimony relating to matters in dispute:

A. I **FIND** the following **FACTS** based upon the testimony of **Bert R. Berry**, who was a credible witness:

Mr. Berry earned a B.A. in political science from Howard University and an M.A. in social studies from Montclair State College. Mr. Berry is certified as a teacher, administrator and supervisor.

In 1955, Mr. Berry became a teacher in the Board's school system. He then became a project coordinator at the Camden Elementary School, vice-principal at the Miller Street School and principal of the Chancellor Avenue School. Since 1971, Mr. Berry has been principal of the Thirteenth Avenue School.

Respondent was a teacher in Mr. Berry's Thirteenth Avenue School during the 1979-80 school year. On March 10, 1980, Mr. Berry met with respondent who, upon finding that a window in her classroom was broken, became so upset, that she announced that she was going to leave for the day. Mr. Berry found it necessary to repeatedly explain her duties to respondent, including the duty to remain with her class for the entire school day. Respondent responded with the bizarre and untrue claim that the school administration had "conspired" to cause the students to vandalize her classroom (see, B-33).

After the 1979-80 school year, respondent was transferred to another school in the Board's system.

B. I **FIND** the following **FACTS** based upon the testimony of **Anzella K. Nelms**, who was a credible witness:

Ms. Nelms earned a B.A., magna cum laude, in elementary education from St. Augustine's College and an M.A. in school administration and supervision from Kean College. Ms. Nelms, who lectures to education groups, is certified for teaching and for school administration and supervision.

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Ms. Nelms was a teacher in North Carolina. She then became a vice-principal in the Board's school system for 20 years and has been principal in the Board's Camden Middle School for nine years.

The respondent taught special education classes in the Camden Middle School from 1980 to 1984. During that period, Ms. Nelms was principal there and was aware of respondent's performance there.

Beginning with the 1983-84 school year, respondent exhibited serious deficiencies as a teacher. For example: respondent had no tasks ready for her class and no disciplinary code developed or followed; on a number of occasions respondent locked her classroom door, keeping out her students; on a number of occasions respondent left her class with no one to cover it; on a number of occasions respondent was shaking and tearful in school; respondent was not able to control and educate her class; and on at least one occasion respondent told Ms. Nelms she could not "function anymore." Respondent also was out 133 of 181 days during that school year.

Ms. Nelms met with respondent at various times and suggested ways for respondent to control and motivate her class, e.g., by getting students' parents involved. Ms. Nelms also suggested to respondent that she seek medical care. The respondent did not follow Ms. Nelm's advice.

None of the other teachers had the difficulties respondent experienced with the same students and, after the 1983-84 school years, Ms. Nelms requested that respondent be transferred to another school.

C. I **FIND** the following **FACTS** based upon the testimony of **Harold Moore**, who was a credible witness:

Mr. Moore earned a B.S. in elementary education and special education from Newark State Teachers College and an M.A. in teaching the hearing impaired from Columbia University. He also has attended administration and supervision courses at Seton Hall

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University. Mr. Moore is certified by the State as a teacher, teacher of special education and as a school administrator and supervisor.

In 1953, Mr. Moore began his employment in the Board's system as an elementary school teacher. Thereafter, he taught the hearing impaired. Thereafter, he became an assistant to the principal at the Arlington Avenue School. Thereafter, he became principal of the Bruce Street School. Since 1978, Mr. Moore has been Director of Special Education.

The respondent, who was Mr. Moore's subordinate, was transferred from the Webster Junior High School, where she was unsuccessful, to the Camden Middle School, where she was teaching in 1980.

In December 1980, Mr. Moore received a Report on Supervisory Visitation describing an incident with respondent's Camden Middle School class where a student approached her with a chair in his hands and respondent struck him with a ruler (see, B-32). Mr. Moore had previously observed respondent in her class and found that she had little rapport with her students and she was unable to control her students who were moving about and leaving the room at will. Mr. Moore concluded that respondent was not going to be successful in this assignment.

On May 7, 1981, respondent was threatened by a knife-wielding student in her class and a Report on Supervisory Visitation was prepared and sent to Mr. Moore describing the incident (see, B-37). Mr. Moore conferred with respondent and gave her suggestions to control her class, e.g., by establishing specific rules of behavior with input from the students, so that they would feel they had "bought into" the system and would follow the rules and by avoiding the appearance that she was "talking down" to the students, so that they would know she cared about them.

Respondent did not follow Mr. Moore's suggestions and, although other teachers were able to control and educate their students, respondent was unable to do so.

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D. I **FIND** the following **FACTS** based upon the testimony of **Alice Moore**, who was a credible witness:

Ms. Moore earned a B.S. in education from Newark State Teachers College and an M.A. in special education from New York University. Ms. Moore is certified by the State as an elementary school teacher, a teacher of the handicapped and as an administrator and supervisor. Ms. Moore is president of the local and State chapters of the Council for Exceptional (handicapped) Children.

Ms. Moore was a teacher for 12 years in Newark and for two years in Elizabeth, and she has been a principal in the Board's system since 1967.

In September 1984, respondent was transferred to the Board's Arlington Avenue School, where Ms. Moore was principal. At that time, Ms. Moore met with respondent and talked with her to prepare respondent for her class because special education students, who were in the class, are sometimes "difficult to get adjusted to." However, if given positive, warm encouragement, these students will learn. Respondent's class consisted of only five students and Ms. Moore placed students in it who were "not too disruptive."

Despite Ms. Moore's efforts, however, respondent was unsuccessful at controlling and educating her students.

On January 22, 1985, Ms. Moore observed respondent in her class and documented her findings in a Teacher Observation Report and attached memorandum (see, B-31). In 15 of 22 areas, respondent was unsatisfactory. For example, respondent's speech was difficult to understand, and she could not control her students. Students were talking back and forth and a fight occurred between two of them, and no academic work or learning was taking place. Copies of the report and memorandum were given to respondent.

In February or March 1985, Ms. Moore provided respondent with a teacher trainer to help respondent control and educate her class; however, respondent demonstrated no improvement.

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On April 30, 1985, Ms. Moore sent memoranda to respondent instructing her that her students should not be wandering the halls (see, J-11); instructing her not to permit a visitor without a pass to remain in her classroom, which respondent had done on April 29, 1988 (see, J-12); and instructing her not to leave her students alone in the classroom, which respondent had done many times (see, J-13).

On May 2, 1985, Ms. Moore sent a memorandum to respondent as "another reminder" that her students should not be permitted to walk the hallways during the lunch period (see, J-10). The lunch period was a "teaching period" during which the special education students could be shown how to use utensils, enjoy their food and clean up. Ms. Moore also suggested that respondent eat lunch "family style" with her students as a way to keep them interested and together. This is a method other teachers of special education students use; however, respondent never did so.

On May 3, 1985, Ms. Moore observed respondent in her class and documented her findings in a memorandum (see, B-29). Respondent announced in a loud voice that she would not stay if a particular student remained in her class. Respondent then announced she was leaving and "not coming back," but then stated she would stay until the end of the day, and that she "would not be coming back." A copy of the memorandum was given to respondent.

On June 14, 1985, Ms. Moore again observed respondent in her class and documented her findings in a Teacher Observation Report (see, B-25). In nine of 22 areas, respondent was unsatisfactory. For example, there was a lack of appropriate control and organization of the class; respondent's speech was difficult to understand; and respondent's directions were not clear. Copies of the Teacher Observation Reports, including this one, were provided to respondent.

In her conferences with respondent during the 1984-85 school year, Ms. Moore emphasized that respondent should improve her "socialization" with her class. Special education students, such as those in respondent's class, need this from the teacher as a basis for cooperation and learning. Despite the conferences and professional improvement

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plan suggestions, and despite having the help of a teacher trainer during the 1984-85 school year, Ms. Moore saw no improvement in respondent's performance.

On June 21, 1985, Ms. Moore completed a "Teacher Evaluation Report" on respondent's 1984-85 school year performance. In seven out of ten areas, respondent was recorded as unsatisfactory (see, B-23). During the 1984-85 school year, respondent did not satisfactorily use effective instructional methods and resources, such as visual aids, records and field trips, respondent did not keep an up-to-date plan book and respondent did not keep up-to-date, accurate records of student progress and achievement. Respondent failed to maintain discipline in her class; her speech and instructions were difficult to understand and inconsistent; and her speech was harsh and occasionally included four letter words. Copies of the teacher evaluation report, together with a "Professional Imrovement Plan," were given to respondent. The professional improvement plan provided suggestions to help respondent improve her performance (see, B-23).

On October 3, 1985, Ms. Moore again observed respondent and documented her findings in a Teacher Observation Report and attached memorandum (see, B-20). On that day, one of respondent's students came to Ms. Moore's office several times to complain that she had nothing to do. When the student returned to the class, the respondent asked another student to direct the student who had complained as to what to do. Also, when the respondent gave a student permission to go to the lavatory, it was closed and locked. Also, respondent's lesson plan was in no apparent order, with loose pages stuffed in. On the report, respondent was recorded as unsatisfactory in 16 of 22 areas. Copies of the report and the memorandum were provided to respondent.

On December 11, 1985, Ms. Moore again observed respondent and documented her findings in a Teacher Observation Report and attached memorandum (see, B-19). On that day, respondent's students were walking the halls when they should have been in class. One of respondent's students came to the principal's office to complain that respondent's directions were always changing. Ms. Moore went to respondent's classroom where respondent and one of her students were involved in an argument. Ms. Moore asked respondent to step into the hall and then into the teacher's room to allow things to cool

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down. There respondent pointed a pen in Ms. Moore's face as she said that the students "cannot learn," "don't belong in her class" and "don't belong in school," and that she was "leaving." On the report 21 of the 22 areas were recorded as "unsatisfactory." Copies of the report and memorandum was provided to respondent.

On December 12, 1985, Ms. Moore again observed respondent and documented her findings in a Teacher Observation Report and attached memorandum (see, B-18). On that day, one of respondent's students came to the principal's office and another student complained that respondent never marked his math paper. Ms. Moore went to respondent's class where no daily schedule appeared to be in use. Respondent and her students were arguing and one student was putting on his coat to leave. Respondent said she didn't have to "take this shit," and said that she was leaving. Copies of the report and the memorandum were provided to respondent.

In January 1986, in an effort to help respondent relate to her students and control them better, Ms. Moore wrote to the parents of respondent's students, asking them to come in for a conference with respondent and others. Respondent refused to speak to one parent and delayed speaking with another until a union representative was present (see, B-16).

On May 15, 1986, Ms. Moore sent a memorandum to respondent highlighting some of her recurring problems so that respondent could improve her performance. For example, respondent's students were running in the hall; respondent was out of her classroom; and respondent had no lesson plan (see, B-12).

On May 6, 1986, Ms. Moore again observed respondent and documented her findings in a Teacher Observation Report and attached memorandum (see, J-7). On that day, respondent was unaware that students were washing and drying their own clothing in machines in the classroom; students were walking in and out of respondent's classroom at will; respondent's students were interrupting the cafeteria lines; respondent's students were fighting; and respondent could not locate her plan book and the individual education plans ("IEP's") for her students. See, N.J.A.C. 6:28-3.6. On the report, respondent was

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recorded as unsatisfactory in all 22 areas. Copies of the report and the memorandum were provided to respondent.

On May 9, 1986, Ms. Moore completed a Teacher Evaluation Report concerning respondent's 1985-86 school year performance. In all ten areas, respondent was recorded as unsatisfactory (see, J-6). During the 1985-86 school year, respondent had not improved her performance or corrected the deficiencies shown in previous reports. Her students were sleeping, walking out of class and fighting; her students' individualized education plans were not executed; her teacher's guide could not be located; and her grades for her students were never presented to the principal. When Ms. Moore discussed her teaching problems with respondent, respondent wrongfully accused other teachers of taking the better students and leaving her with the undesirables. Copies of the teacher evaluation report and an updated professional improvement plan were given to respondent.

The respondent left her class in May 1986 and did not return for the rest of the school year.

On January 7, 1987, Ms. Moore again observed respondent in her class and documented her findings in a Teacher Observation Report and attached memorandum (see, B-9). In 20 of 22 areas respondent was found to be unsatisfactory. One student was not in the classroom and another had walked out of the school building. The other students talked among themselves. Respondent had failed to submit to the principal lesson plans that were due in December 1986, and respondent had failed to write or complete lesson plans for January 1987.

On March 18, 1987, Ms. Moore again observed respondent and documented her findings in a Teacher Observation Report and attached memorandum (see, J-4). On that day, respondent's class had only three students. One was permitted to put his head down to sleep and another did no school work. Respondent worked with the third child. Respondent did not record in her lesson plan book which lessons had been taught or which students were present. No student's work was displayed and no learning aids such as films, books or flash cards (available in the school) were utilized. In front of the class,

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respondent commented,..."he can't learn," speaking about one of the students. The respondent had apparently not utilized any of the suggestions provided by Ms. Moore or the professional improvement plan. On the report, 20 of 22 areas were recorded as unsatisfactory. Copies of the report and the memorandum were provided to respondent.

During the 1986-87 school year, respondent walked out of her class three or four times and threatened to walk out many more times. She also announced in front of her class that she "wasn't putting up with this shit!" and that she would "never come back."

On June 9, 1987, Ms. Moore completed a Teacher Evaluation Report on respondent's 1986-87 school year performance. In all areas, respondent was recorded as unsatisfactory (see, B-3). During the 1986-87 school year, respondent's performance was characterized by: students sleeping in class, walking the halls and arguing with respondent; students yelling obscenities at respondent; respondent's failure to use audiovisual teaching tools; respondent's failure to encourage and motivate students by visibly posting their work; respondent's failure to follow an educational plan and keep a systematic record of grades; and respondent's threats to walk out, and "never come back" made in front of the class. Finally, respondent did not keep, maintain and submit the records, including students' writing samples and grades which were due to be presented to her superior at the conclusion of the school year. In the report, Ms. Moore recommended that respondent be given no salary increment, that she be suspended without pay, and that tenure charges be filed. Copies of the report and an updated professional improvement plan were given to respondent.

On October 7, 1987, Ms. Moore again observed respondent in her class and documented her findings in a memorandum (see, B-4). On that day, students had complained to Ms. Moore that respondent's lesson did not make sense. Respondent then complained to Ms. Moore that her students' behavior was "bad." Ms. Moore and respondent discussed what to do about the lesson and respondent refused Ms. Moore's instruction concerning how to convey the lesson. Respondent then stated that she had "had it with this class, the one before and the one before that" and that she was "leaving." Respondent then left school at 10:10 a.m.

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During the years 1984 to 1987, respondent's students complained of not learning in her class and the records confirmed that to be true. Teaching special education students sometimes requires creative methods, however, they are capable of learning. For example: reading a newspaper to buy things; reading a paycheck; figuring a household budget; and figuring taxes all could be used effectively to teach them. Also, a regular written schedule is necessary. For example, oral reading on one day each week, followed by work sheets to be taken home on another day each week, would be helpful. Also, displaying students' work on bulletin boards is a helpful way to praise and encourage them. Respondent did not utilize these methods. Rather than "positive reinforcement," respondent's negative style of speech and physical distance from the students was counterproductive. Her class learning progress and attendance record was poor and its dropout rate was high.

During the years 1984 to 1987, respondent had, at various times, stated to Ms. Moore that she did not "know how to teach" her special education students, that the other teachers were "out to make her look bad"; that the students were "out to make her look bad"; and that her neighbors were "out to get her." From this, Ms. Moore concluded respondent was not only not a competent teacher, but that respondent needed psychiatric help and Ms. Moore suggested to respondent that she seek such help. Respondent refused this suggestion as well as the offer of help from the Newark Teacher's Union.

Overall, in Ms. Moore's opinion, respondent has exhibited lack of control of her students and herself and an inability to teach.

E. I FIND the following FACTS based upon the testimony of Dorothy Gould, who was a credible witness:

Ms. Gould earned a B.A. in English and mathematics from Upsala College and an M.A. in mathematics from Montclair State College. She also has 32 credits in administration and supervision from Kean College. Ms. Gould is certified by the State as a teacher, school administrator, principal and assistant superintendent.

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Ms. Gould was a teacher for 25 years and a principal for 13 years and has been responsible for special education in the Board's system. As respondent's superior, Ms. Gould has knowledge of her performance and difficulties as a teacher.

Respondent was transferred from the Thirteenth Avenue School to the Camden Middle School, and then to the Arlington Avenue School, each time at the request of the school administrator.

In 1981, respondent's principal reported to Ms. Gould that respondent had left her classroom at the Camden Middle School unsupervised without permission from her superior.

In her memorandum dated March 3, 1986, Ms. Gould recommended the withholding of a salary increment for the 1986-87 school year because of respondent's almost exclusively unsatisfactory ratings documented in the Teacher Observation Reports (see, J-8).

On April 9, 1986, Ms. Gould wrote to respondent asking her to meet with her to discuss a number of problems including: her inability to control students and prevent their walking out of the classroom; criticism of administrators in front of students; complaints that she "deserves better students" and that her students "cannot be taught"; frequent threats to leave the school; her unsatisfactory annual evaluations for 1985-86 and 1984-85; and the consequent recommendation of the withholding of a salary increment (see, B-14).

In a meeting that followed, Ms. Gould and respondent did review these matters. The respondent made no request for help and no excuses for her unsatisfactory ratings during the meeting. In a letter to respondent dated May 1, 1986, Ms. Gould reviewed the points discussed during the conference (see, J-5).

In February or March 1986, Ms. Gould observed respondent's class. There were no displays of students' work, as a way to praise and encourage them to do classwork, and students' I.E.P.'s were not available. The atmosphere was not conducive to motivation or

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cooperation. When Ms. Gould and respondent discussed this, respondent complained about being placed with the class. Ms. Gould then encouraged respondent to ask for "help" if she needed it to teach the class because the students were "not going to disappear."

On May 18, 1986, Ms. Gould received from Ms. Moore, respondent's principal, the Teacher Observation Report dated May 6, 1986, in which respondent's ratings were exclusively unsatisfactory (see, B-11). Ms. Gould forwarded these materials to school administrators as additional information relative to the withholding of an increment for 1986-87 (see, B-11).

On January 18, 1987, Ms. Gould received another memorandum from Alice Moore documenting the fact that respondent had on that day complained of the students in front of the class; that respondent's books and other items were on the floor of the classroom; and that respondent had left her class before the end of the day (see, B-8).

Because of respondent's unsatisfactory ratings and the above-noted memoranda, Ms. Gould recommended that respondent not receive an increment for the 1985-86 and 1986-87 school years.

F. I **FIND** the following **FACTS** based upon the testimony of **William Harvey**, who was a credible witness:

Dr. Harvey earned a B.S. in Industrial Arts and a Masters in Education from the University of Maryland. He also earned an Ed.D. from Rutgers University. Dr. Harvey is certified as a teacher, principal, administrator and supervisor.

Beginning in 1967, Dr. Harvey taught at the University of Maryland, Kean College, Montgomery Pre-Vocational School in Newark, and the Center for Occupational Education and Experimentation. Dr. Harvey was Director of Student Services at the Somerset County Vocational Technical Schools, a high school principal in the Somerset system and an assistant superintendent in the Somerset system. Since 1987, Dr. Harvey has been Assistant Executive Superintendent of Pupil/Personnel Services in the Board's system.

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In 1987, Dr. Harvey reviewed respondent's file and conferred with her relative to her many incidents. During the interview, respondent told Dr. Harvey that because she had told the students they were "stupid," they were "out to get" her. Dr. Harvey concluded that respondent should not be teaching.

On September 14, 1987, Dr. Harvey prepared and sent to the Board a memorandum outlining respondent's deficiencies, and recommending tenure charges against respondent.

G. Respondent, **Mary Burnside**, testified as follows:

The respondent earned a B.A. at Jersey City State College and is certified as a teacher of the handicapped.

In 1974, respondent began in the Board's system at the Thirteenth Avenue School as a teacher of the handicapped. After five years at the Thirteenth Avenue School, respondent was transferred to Barringer Preparatory School where she remained for one year.

In 1980, respondent was transferred again to the Camden School, where she tried to establish rules of behavior with her class. Respondent's students, however, were "lazy" and "manipulative." Many of these students brought "big bags of food" into respondent's classroom and others walked out of respondent's classroom, in violation of respondent's rules of behavior.

During the 1983-84 school year, respondent was seriously injured in an automobile collision which caused her to suffer "tremendous pain." At times, respondent "didn't know where she was." It was that accident and her injuries which caused her numerous absences during that school year.

In 1984, respondent was transferred to the Arlington Avenue School, where Ms. Moore was principal. Relative to the December 11, 1985 incident, reported by Ms. Moore (see, B-19), respondent was trying to teach a lesson when Ms. Moore walked in and a

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student complained about respondent directly to Ms. Moore. This undermined respondent's authority and led to the confrontation between respondent and Ms. Moore during which respondent did point at Ms. Moore with her pen. This is a habit of respondent's and she apologized to Ms. Moore for doing so.

Respondent admitted making statements in December 1985, that certain students "cannot learn"; that a certain student "[did]n't belong in her class"; and that a certain student should be "take[n] out of [her] room."

Respondent admitted that she did say she wanted her union representative present for the meetings with parents arranged by Ms. Moore in January 1986; however, respondent stated this was because she did not want statements she might have made during the meetings to be "changed."

By 1986, respondent was "fed up" with her students' behavior: They were laying on tables; going through her desk; throwing books; and pulling their pants down. Respondent told Ms. Moore she felt it was the school that was not "doing the job" of controlling the students so that teachers could educate them. Ms. Moore encouraged respondent to try to relate to the students, e.g., by touching them, but respondent felt this was inappropriate since some of the students were 17 years old. Respondent felt Ms. Moore treated the students "like babies."

Respondent denied ever leaving her class unsupervised, except to get help when fights broke out and she needed immediate help from security.

Respondent felt she never ignored any student. She brought in magazines such as Sports Illustrated for use in a "reading corner," to encourage and motivate them to read. Nonetheless, respondent was largely unsuccessful in controlling and educating her students. "Very little teaching went on, due to discipline problems." Respondent felt her students would break any rule that would be conducive to a better class and "to try to make (her) look bad."

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Respondent claimed that she did review the students' I.E.P.'s. However, in some cases, respondent felt the I.E.P.'s did not accurately describe the student's handicaps and/or abilities. For example, a "multiply handicapped" student might be described as "neurologically impaired." See, N.J.A.C. 6:28-3.5(a) 6 and 7. Also, a student might not have reading ability as high as that described in the I.E.P. Respondent refused to merely "pass along" a student who had not mastered new skills. In doing this respondent was bucking the system and she believes this is the reason her superiors wanted to get rid of her.

Respondent admitted that she refused to sign a number of her Teacher Evaluation Reports and also admitted that she had and unsuccessfully attempted to grieve them, because of their unsatisfactory ratings.

I note that while the respondent is a well-dressed and ladylike woman, her manner of speaking is unusual and sometimes difficult to understand.

I **FIND** that despite good intentions, the respondent was unable to control and educate her students.

III. The following are **FINDINGS OF FACT** related to the particular tenure charges:

A. Relative to the **First Count** of the **Tenure Charges** (Incompetence) I **FIND:**

Relative to the **First Count, paragraphs 1 and 2:** from 1974 to 1988 respondent was employed in the Board's school system as a special education teacher, who became tenured.

Relative to the **First Count, paragraphs 3, 4b, 4c, 4d and 4e:** during the 1984-85, 1985-86, 1986-87 and 1987-88 school years, respondent demonstrated an inability to control her class and educate her students. More particularly, during that period, respondent failed to effectively promulgate or post classroom rules of behavior for her students; respondent failed to effectively maintain centers of interest for her students; and respondent failed to effectively organize and utilize classroom time.

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Relative to the **First Count, paragraph 5:** beginning in 1980 and continuing into 1988, respondent received regular suggestions and aid in an effort to help her to improve her performance and eliminate her deficiencies; however, respondent has been unable to do so. Beginning in 1985 and continuing into 1988, respondent received regular written reports notifying her that her performance was unsatisfactory and providing her with suggestions for improvement and elimination of her deficiencies; however, respondent has been unable to so improve.

Relative to the **First Count, paragraphs 6a, 6b, 6c, 6e and 6f:** beginning in 1980 and continuing into 1988, respondent has demonstrated an absence of effective "teaching characteristics." More particularly, during that period respondent lacked a "wholesome rapport" with her students; respondent lacked a "sympathetic understanding of the feelings and needs" of her classes; respondent failed to utilize available "instructional materials;" respondent failed to keep available and utilize I.E.P.'s and lesson plans; and respondent failed to "use a well-modulated voice and clear diction."

Relative to the **First Count, paragraphs 7a, 7b, 7d, 7f, 7g, 7h and 7i:** during the 1984-85, 1985-86, 1986-87 and 1987-88 school years, respondent failed to prepare, maintain and utilize lesson plans; respondent failed to utilize educational methods, tasks and objectives in a manner understandable and useful to her students; respondent failed to motivate her students so that they would develop notions of "leadership and responsibility;" and respondent failed to recognize differences in the levels of her students' abilities and to utilize appropriate lessons for each level of instruction and education.

Relative to the **First Count, paragraphs 8, 8a, 8b, 8c, 8d, 8e, 8f, 8g and 8h:** Beginning in 1985 and continuing to 1988, respondent received regular reports notifying her that her performance was unsatisfactory and providing her with suggestions for improvement and elimination of her deficiencies, including the following: it was suggested that respondent read and familiarize herself with Child Study Team materials relative to her students and that respondent plan lessons and activities tailored to her students' needs; it was suggested that respondent use clearer, simpler speech and

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instruction in the classroom; it was suggested that respondent utilize a more "relaxed and flexible" classroom format and it was suggested that respondent accept and utilize criticism and suggestions from her superiors; it was also suggested that respondent develop, utilize and maintain definite lesson plans. Respondent was reminded that her special education students required her emotional commitment and investment in order to be properly motivated.

Relative to the **First Count, paragraph 9:** despite the numerous notices of her unsatisfactory performance and suggestions for her improvement, respondent has failed to improve her performance and correct her "deficiencies."

Relative to the **First Count, paragraph 10:** the respondent received no salary increment following the 1986-87 school year.

Relative to the **First Count, paragraph 11:** the respondent's unsatisfactory performance and deficiencies have resulted in a substantial failure to provide a "thorough and efficient education" for her students.

Relative to the **First Count, paragraph 14:** during the 1984-85, 1985-86 1986-87 school years, the respondent's unsatisfactory performance and deficiencies have caused her superiors to expend an inordinate amount of time notifying respondent of her unsatisfactory performance and suggesting to her methods to improve her performance and correct her deficiencies.

Relative to the **First Count, paragraph 15:** beginning in 1985, respondent has been the subject of at least eight teacher evaluation reports and in all of these respondent's performance was evaluated as largely or exclusively "unsatisfactory." Further, in the annual Teacher Evaluation Reports for the school years 1984-85, 1985-86, and 1986-87 respondent's performance was evaluated as largely or exclusively "unsatisfactory."

B. Relative to the **Second Count** of the **Tenure Chare** (Unbecoming and Unprofessional Conduct) I FIND:

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Relative to the **Second Count, paragraph 3a, 3b, 3e and 3f:** on May 3, 1985, respondent stated that she was leaving and "not coming back." On June 21, 1985, respondent's speech to her class included vulgar words. On December 12, 1985, respondent stated to her class that she wasn't going to "take this shit" from her class. On December 11, 1985, respondent described various students as unable to learn, not belonging in her class, not belonging in school and respondent again stated that she was "leaving." On March 18, 1987, respondent stated in her class that one of her students could not "learn." At various times during the 1986-87 school year, respondent stated that she "wasn't putting up with this shit"; respondent threatened to walk out; respondent did walk out of her class; and respondent stated she was "never coming back." On October 7, 1987, respondent again stated that she had "had it with this class, the one before and the one before that" and that she was "leaving." That is, respondent has set a "bad example" for her students through her use of abusive language; respondent has failed to "sympathetically understand" her students' feelings and needs; respondent has failed to utilize effective instructional techniques and failed to create a proper educational "environment"; respondent has caused low "morale" in her students; and respondent has caused her superiors to expend an inordinate amount of time notifying the respondent of her unsatisfactory performance and attempting to improve her performance.

Relative to the **Second Count, paragraph 5,** despite regular receipt of notice of reports, her unsatisfactory performance and despite regular receipt of suggestions and aid to improve her performance, respondent has demonstrated an inability to eliminate her deficiencies.

Relative to the **Second Count, paragraph 8,** during the period 1985 to 1988: respondent failed to eat lunch with her students, as required. Respondent failed to prepare, maintain and submit lesson plans and other records required by her superiors and failed to maintain and follow I.E.P.'s for her students. Beginning in 1980, respondent on many occasions expressed a "disregard of procedures," and a disregard of her duty to remain with her class. On several occasions respondent walked out of her classroom leaving her students unsupervised.

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Relative to the **Second Count, paragraph 9:** respondent has repeatedly conducted herself before her students and superiors in a manner demonstrating a lack of dedication to her duties, in a manner harmful to the interests of her students and in a manner "unbecoming" of a teacher.

LEGAL DISCUSSION

I. THE BURDEN OF PROOF OF JUST CAUSE FOR DISMISSAL OF A TENURED TEACHER

The tenure provisions in school laws were designed to aid in the establishment of a competent and efficient school system by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949).

However, although the tenure system represents important legislative policy, tenure is not a property right and it is always subject to the greater public interest in a thorough and efficient system for the education of children. See, N.J. Const. Art VIII §4, par. 1, Laba v. Newark Board of Education, 23 N.J. 364, 391 (1957); See also, In the Matter of the Tenure Hearing of Leo S. Haspel, Board of Education of the Borough of Metuchen, Middlesex County, 1964 S.L.D. 17, 30. The Legislature has therefore provided:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner:
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to

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> act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided. [Emphasis added] N.J.S.A. 18A:6-10.

In this administrative proceeding, the Board's burden of proof has been satisfied and the respondent will be ordered dismissed if it has been established by a preponderance of the credible evidence that the respondent is "incapable" of teaching ("incompetent"), that she has engaged in "unbecoming conduct," or that she has demonstrated other "just cause" for her removal as a teacher, such as unbecoming and unprofessional conduct. See, N.J.A.C. 1:1-2.1 "Burden of Proof." See also, School District of the Borough of Red Bank v. Williams, 3 N.J.A.R. 237, 239 (1981). See also, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). "Preponderance" means the "greater weight of evidence or evidence which is more credible and convincing..." Black's Law Dictionary, Rev'd 4th Ed. (1968), at 1344.

II. CONCLUSIONS RELATING TO THE CHARGE OF INCAPACITY AND INCOMPETENCE

Evaluation of a teacher's competence is generally a matter of total impression resulting from a synthesis of observations made over a period of time. In the Matter of the Tenure Hearing of Francis M. Starego v. Borough of Sayreville, Middlesex County, 1967 S.L.D. 271, 272.

The respondent has failed to create a classroom atmosphere which would motivate students to learn. She has failed to develop, maintain and utilize lesson plans and failed to teach in accordance with her students' I.E.P.'s. She has failed to achieve even a minimal rapport with her children. She has failed to submit records to her superiors in a proper, timely way.

Despite the numerous suggestions and aid provided by respondent's superiors, her class deteriorated to a situation where her students were not educated and other classes were disturbed by her students. It is noted that no other teachers experienced such an inability to control and discipline the same students who passed through respondent's

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classes. In any event, competent teachers are able to create a climate for learning which interests and motivates the students. Respondent exemplifies the rule that a lack of discipline results from poor teaching, whether the students exhibit high or low scholastic aptitude, so that student self-control is a by product of good teaching. See, In the Matter of the Tenure Hearing of Leo S. Haspel, at 27. See also, In the Matter of the Tenure Hearing of Inez McRae, School District of the City of Trenton, Mercer County, 1977 S.L.D. 570, 584, where a lack of discipline and class control was found to be so gross as to constitute incompetence. Respondent's excuse that she was assigned students who were less motivated and able to learn and behave well is rejected. Compare, In the Matter of the Tenure Hearing of Francis M. Starego, 1967 S.L.D. 271, 273.

The respondent's incapacity and incompetence has been clearly demonstrated by numerous incidents and she has been unable to improve her performance and eliminate her deficiencies, even after notice, suggestions and aid. See, Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd., 131 N.J.L. 326 (E. & A. 1944).

I CONCLUDE that the Board has proven that the respondent is incapable and incompetent in the performance of her teaching duties.

III. CONCLUSIONS RELATIVE TO THE CHARGE OF UNBECOMING AND UNPROFESSIONAL CONDUCT

A teacher's display of loss of control, anger against students and fellow school employees, intemperate use of profanity, failure to attend to lunch duties; and precipitous absences from duty may constitute unbecoming and unprofessional conduct requiring dismissal. See, In the Matter of the Tenure Hearing of Inez McRae, School District of the City of Trenton, Mercer County, at 575; see also, In the Matter of the Tenure Hearing of George Milligan, School District of the Township of White, Warren County, 1979 S.L.D. 583, 596-597. See also, In the Matter of the Tenure Hearing of Juanita Zielenski, School District of the Town of Guttenberg, Hudson County, 1977 S.L.D. 716 and In the Matter of the Tenure Hearing of Chris A. Gervasio, School District of the Township of Ewing, Mercer County, 1978 S.L.D. 477.

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The respondent on numerous occasions has lost control of herself; used profanity; directed negative language at her students such that she only lessened their motivation; threatened to walk out on her class; walked out on her class, announcing she would never be back; and failed to maintain her classroom and her records in a manner conducive to organization and learning. Certainly, all of this worked to the detriment of respondent's students and the school system.

I **CONCLUDE** that the Board has proven that the respondent has engaged in unbecoming and unprofessional conduct.

IV. CONCLUSIONS RELATIVE TO THE UNFITNESS AND THE DISMISSAL OF RESPONDENT

It is not reasonable to expect respondent's superiors to continue spending an inordinate amount of time counselling and directing respondent. The respondent has had continual notices, counselling and aid and no improvement can be expected. See, In the Matter of the Tenure Hearing of Chris A. Gervasio, at 486-487. "Unfitness" to hold a post may be shown by one incident, if sufficiently flagrant, or it may also be shown by a pattern of incidents. See, Redcay v. State Board of Education, at 371. Under either test, I **CONCLUDE** respondent is unfit and must be dismissed from her post.

ORDER

I **ORDER** that the respondent be dismissed from her position with the Board.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 1617-88

I hereby FILE this Initial Decision with SAUL COOPERMAN for consideration.

9/9/88
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

9/14/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 14 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF MARY BURNSIDE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter including the initial decision rendered by the Office of Administrative Law has been reviewed by the Commissioner of Education. Exceptions were filed by both parties pursuant to N.J.A.C. 1:1-18.4.

It is observed that respondent in her exceptions to the initial decision relies on her post hearing brief previously filed with the ALJ. The Board in turn relies on its post hearing brief in reply to respondent's exceptions. It is further observed that neither party has provided the Commissioner with a copy of the transcripts of the hearings conducted in this matter in support of their respective positions.

In her post hearing brief, respondent advances two points of argument in connection with the tenure proceedings against her:

POINT I

THE CHARGES OF INEFFICIENCY AND INCOMPETENCY SHOULD BE DISMISSED. (Post Hearing Brief, at p. 1)

POINT II

ASSUMING WITHOUT CONCEDING, THAT THE TENURE CHARGES OF UNBECOMING CONDUCT AND/OR UNPROFESSIONAL CONDUCT SHOULD BE HELD TO HAVE BEEN ESTABLISHED, THE PENALTY OF DISMISSAL SHOULD NOT BE IMPOSED. (Id., at p. 9)

In support of her argument regarding Point I, respondent claims that the Board's failure to follow the statutory and regulatory provisions of N.J.S.A. 18A:6-11 and N.J.A.C. 6:24-5.1(b)(7)c mandates that such tenure charges against her be dismissed.

The Commissioner observes that the ALJ has, in fact, dismissed the Board's tenure charges of inefficiency against respondent. (Initial Decision, ante)

Similarly, respondent argues that she may not be adjudged incompetent with respect to the tenure charges against her by virtue of the following:

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> Inefficiency is a state or condition which indicates that it can be corrected whereas incompetence suggests lack of knowledge or ability to do the job assigned. In the Matter of the Tenure Hearing of Alfred E. Jakucs, School District of the City of Linden, 1968 S.L.D. 189.
>
> In In the Matter of the Tenure Hearing of Frank J. Napoli, School District of the City of Salem, [decided by the Commissioner February 16, 1988] the Commissioner, in discussing the difference between incompetence and inefficiency, said [at p. 68]:
>
> > ***The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow, OAL DKT. EDU 6440-81 (Nov. 5, 1982), adopted, Comm'r of Ed. (Dec. 20, 1982). [affirmed State Board May 4, 1983]*** (Slip Opinion, at p. 37) (emphasis in text) In re Nafash, Ridgefield Bd. of Ed., decided by the Commissioner March 12, 1984***
>
> (Respondent's Post Hearing Brief, at pp. 6-7)

Moreover, respondent argues that it was the Board's own witness who testified that she was inefficient and not incompetent.

The Commissioner has reviewed the record before him and he is satisfied that the preponderance of the proofs presented by the Board clearly demonstrates that respondent was so lacking in competency to perform the responsibilities of a classroom teacher that it would have been a useless exercise to invoke the 90-day improvement period required under the provisions of N.J.S.A. 18A:6-11. The record is replete with incidents that occurred over a

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period of years which establish that respondent lacked the requisite ability or competency to perform those teaching functions expected of her by the Board. The Commissioner so holds.

Finally, respondent in Point II of her post-hearing brief relies on a host of prior decisional school law incorporated herein by reference in an attempt to establish that a penalty of less than dismissal is in order in the event that it is determined that she is found guilty of unbecoming or unprofessional conduct as a tenured teacher. (Respondent's Post Hearing Brief, at pp. 9-11)

In this regard the Commissioner finds and determines that the ALJ relying on prior decisional case law incorporated within the initial decision properly found and concluded that: respondent's loss of self control on numerous occasions, her use of profanity, the direction of negative language against her pupils which lessened their motivation, her threats to walk out on her class announcing that she would never be back, and her failure to maintain her classroom and her records in a manner conducive to organization and learning worked to the detriment of her pupils and the overall operation of the school system. The Commissioner adopts as his own all of the foregoing findings and conclusions reached by the ALJ in the initial decision which establish that respondent is guilty of incompetence and unbecoming and unprofessional conduct as a tenured teacher. In re Taylor, Jersey City, decided by the Commissioner October 20, 1988

In the Commissioner's view, the tenure charges against respondent found to be true in fact herein are sufficiently numerous and flagrant to conclude that she is unfit to continue as a tenured teacher in the Board's employ. The Commissioner so holds. (See Redcay, supra.)

Accordingly, the Commissioner finds and determines that respondent shall forfeit her tenured teaching position in the employ of the Board of Education of the City of Newark School District effective as of the date of this decision. It is further ordered that pursuant to N.J.A.C. 6:11-3.7 a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and, in its discretion, any further action deemed appropriate.

COMMISSIONER OF EDUCATION

October 25, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1279-88
AGENCY DKT. NO. 33-2/88

BURLINGTON TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BURLINGTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

William G. Wallen, Esq., for petitioner (Selikoff & Cohen, attorneys)

David M. Serlin, Esq., for respondent

Record Closed: August 10, 1988 Decided: September 26, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

This petition of appeal addresses the validity of an employee's dress code adopted by the Burlington Township Board of Education (Board) and with which teachers must comply. The Burlington Township Education Association (Association) alleges that the code imposes unreasonable restrictions on certain members and bears no substantial relationship to a legitimate objective of the Board. The Association also contends the code violates unspecified State Board rules in that the code allows for asserted insufficient options regarding style of dress for males because the code prohibits open collars. Therefore, the Association contends the code is an arbitrary exercise of the

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Board's discretionary authority. The Association seeks an Order to permanently enjoin the Board from enforcing the complained of provisions of the code. The Board denies the allegations and contends that the code is a proper exercise of its discretion. The Commissioner of Education transferred the matter on March 2, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing telephone conference was conducted by Administrative Law Judge Joseph Lavery on April 14, 1988 at which time a hearing was scheduled to commence June 3, 1988. In the meantime, the matter was transferred to this judge.

The scheduled hearing was cancelled upon the representation of counsel to the parties that the matter was to be settled. However, settlement efforts were unsuccessful. The parties then elected to file a joint stipulation of relevant fact and cross-move for a summary decision. The record on the cross-motions for summary decision closed August 10, 1988. This initial decision concludes that the Association failed to establish the truth of its allegation that the employee dress code adopted by the Burlington Township Board of Education is in any way improper, unlawful, or an abuse of the Board's discretion. The controverted dress code is reproduced here in full:

EMPLOYEE DRESS CODE

> The Board is cognizant of the rights of employees to express their individuality through their attire. The Board also recognizes the value of tasteful and appropriate dress which is conducive to a dignified environment for learning and the fostering of respect and discipline in the classroom situation. The Board observes that teachers serve as role models for the children of our schools, and help to shape students' attitudes and values concerning neatness, pride, and self-worth.
>
> Balancing these factors, the Board has adopted a dress code for employees that is only minimally restrictive but sets reasonable standards for grooming and appearance during school hours. The dress code for employees is to be enforced fairly and evenhandedly at all times, and shall be periodically reviewed for reasonableness under the standard of generally acceptable dress in business and social contexts consistent with changing community attitudes.
>
> Administrators, teachers, secretaries, and aides, of the Burlington Township School District shall be neatly attired and groomed while discharging their responsibilities to the District.

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I. Grooming and attire shall meet the following criteria during school hours:

A. Females may wear skirts, slacks, blouses or sweaters, dresses, suits, or slack suits.

B. Male staff members shall wear a dress shirt and tie. Dress or sport jackets, or sweaters, shall be optional and not required.

C. As an alternative to shirts and ties, males may also wear turtle neck shirts, along with required sport or dress jackets.

II. Grooming not acceptable during school hours:

A. Males - open shirt collars

B. Torn or dirty clothing

C. Sneakers

D. See-through (transparent) blouses

E. Excessively tight fitting clothing

F. Denim dungarees or jeans and jackets (corduroy is permitted)

G. Any dress or grooming which would attract attention, create disruption or would be potentially unsanitary or dangerous.

III. Special Rules

A. Physical Education teachers may wear clothing appropriate to their subject area, including athletic jackets, T-shirts, pullover shirts, kilts, striped pants or slacks, shorts, culottes, jogging suits, warm-ups, and sneakers or appropriate footwear.

B. Vocational Education/Shop and Art teachers may wear smocks, shop aprons, coveralls, and other protective attire if appropriate for the subject area.

C. Other Classes - Other protective clothing such as smocks, lab coats or aprongs may be worn as needed by teachers in laboratory science, art, employment orientation, or nursing.

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IV. D. Other Employees - Employees involved in transportation, maintenance, custodial stff, and cafeteria matrons shall wear appropriate clothing to accommodate their working situations.

V. Prior Approval:

A. If any employee is uncertain as to the appropriateness of a garment, a brief written description of the clothing he or she desires to wear, should be submitted to the Chief School Administrator. The Chief School Administrator shall respond in writing to the employee within three days.

Employees may appeal this decision to the Board of Education at the next regularly scheduled Board meeting.

B. Occasionally, specially organized learning activities, e.g., field trips to a farm or Sesame Place, may reasonably dictate variations from the dress code of the normal classroom setting. Employees shall discuss this with their principals, at least one day prior to the activity. The principals shall have authority to approve variations from normal dress, but should report the situation to the Superintendent or his designee.

VI. Enforcement:

A faculty member violating the dress code will be issued a letter of reprimand. On the first offense, copies will not be filed in the employee's personnel file; on the second offense the letter of reprimand, with reference to the first letter, will be sent to the personnel file. If a third offense occurs within a two-year period, the Superintendent shall advise the Board of Education and may recommend disciplinary measures including: withholding of increment, charges of insubordination, or other sanctions as permitted by law.

VII. Severability

This dress code shall be deemed to be severable. If any section is found to be unreasonable or void by a forum of competent jurisdiction, only that section shall be deemed deleted.

This policy become effective July 1, 1988.

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In addition to the employee dress code as stated above, the parties stipulate the following facts:

1. Petitioner is the collective bargaining representative for all non-supervisory teaching personnel with the exception of cafeteria matrons.

2. Petitioner and Respondent are parties to a collectively negotiated agreement for the term commencing July 1, 1985 through June 30, 1988.

3. On November 23, 1987, Respondent approved an official policy establishing a dress code for teachers, which dress code is attached hereto as Exhibit 1.

4. Respondent's dress code applies to all employees within the school system which consists of two elementary schools, one middle school and one senior high school.

5. The aforementioned schools are used for the instruction of pupils during the regular school year from September to June. No school is centrally air-conditioned although several rooms do contain window units.

6. Several of Petitioner's members such as physical education and practical arts teachers, must wear specialized clothing in performance of their duties. The dress code in Section III "Special Rules" provides for certain exceptions to the dress code and Section IV "Prior Approval" permits for other exceptions to be granted by the Chief School Administrator with appeal to Respondent.

7. To comply with the dress code some teachers are required during the course of teaching day to change from their specialized clothing to clothing which comports with the provisions of the dress code.

8. One physical education teacher is required to teach either health or physical education in two schools and has a minimum of 45 minutes to change her attire prior to teaching the second course. During the final quarter of this school year this teacher will only teach physical education so that she will not be required to change her attire. Commencing in the fall this teacher will only be teaching physicla education in one school.

The foregoing constitutes all relevant and material facts of the matter as stipulated by the parties.

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LEGAL ARGUMENTS

I.

ASSOCIATION

The Association argues that the dress code unduly limits the selection of clothing by male teachers. In its brief, the Association explains as follows:

> R. Respondent's code requires male teachers to wear ties and jackets, or turtlenecks and jackets, in all weather, including the hot summer months during summer school. The code specifically prevents male teachers from selecting tasteful, but cooler clothing for these months, thereby unduly limiting them from wearing clothing more appropriate to the weather. At p. 4

The Association contends that the code is intolerant of heat because a teacher, presumably a male teacher, who removes a jacket or tie, even in a stifling and humid room, would be in violation of the dress code and subject to its mandatory punishment. Finally, the Association contends that because a violator of the code may be charged with insubordination and may be subject to tenure charges that that punishment is excessive and, as such, the code itself must be rejected. Furthermore, the Association contends that because possible discipline ranges from an increment withholding or tenure dismissal charges that the code itself could be inconsistently applied to two separate teachers. Therefore, the Association concludes that because teachers may be subject to inconsistent treatment under the code the code itself must fall.

The Board contends that the petition of appeal must be dismissed because the Association failed to exhaust its remedies under the negotiated agreement. Alternatively, the Board contends the petition of appeal must be dismissed because of the controverted dress code is a rational means to achieve a legitimate objective of the Board to foster mutual respect between teacher and pupil and to ensure that teachers are an appropriate role model for pupils with respect to manner of dress in the schoolhouse. Finally, the Board contends that the dress code need not have a substantial relationship to a legitimate goal; a rational relationship is all that is required.

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The Board does note that the Association argues erroneously that a male teacher is required to wear a jacket under the code at all times. The Board points out that paragraph 1, section B, of the Code specifically states "Dress or sport jackets, or sweaters, shall be optional and not required."

LEGAL ANALYSIS

When a board of education acts within its authority, its actions are presumed lawful and correct. One who challenges an action taken by a board carries the burden of persuasion to establish by a preponderance of credible evidence that the complained of action is arbitrary, capricious, or unreasonable, or beyond the scope of the board's authority. Here, the Association does not contend the Board is not authorized to adopt a dress code under its general rule-making authority at N.J.S.A. 18A:11-1. Rather, the Association contends the dress code is an arbitrary action of the Board and bears no substantial relationship to a legitimate objective.

The test as noted by the Board is whether the code bears a rational relationship to a legitimate objective of the Board; not a substantial relationship. See, Cumberland Regional Education Association v. Board of Education of Cumberland Regional High School District, New Jersey Superior Court, Appellate Division, Dkt. A-1422-80T2 (Jan. 8, 1982) (unpub). In this instance, the dress code is substantially clear and concrete; it imposes no undue financial burden on individual teachers; it does not unduly limit an individual's right of selection and freedom of expression; it is presumed the code shall be reviewed periodically in future years; and, it is presumed the code shall be consistently interpreted and enforced. Thus, the code meets the five-part test of the State Board of Education as announced in Carlstadt Teachers' Association v. Board of Education of Carlstadt, 1980 S.L.D. - (November 5, 1980). The Association's fears that one who violates the dress code will automatically be subject to tenure charges are unsubstantiated fears and pure conjecture. Should such a situation arise in the future, the Association has avenues of legal relief available to it as does such an affected teacher.

The Association's argument that it is improper for a teacher to be disciplined who violates the dress code three time within a two-year period as arbitrary and subject to possible abuse by school administrators is equally conjectural and affords no basis to interfere with the controvered dress code.

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CONCLUSION

Having considered the dress code, in light of the stipulated facts and the legal arguments of the Association, I **CONCLUDE** that the Burlington Township Education Association failed in its burden of persuasion to establish by a preponderance of credible evidence that the controverted dress code is arbitrary, capricious, or unreasonable or an improper exercise of the Board's authority. The petition of appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

September 26, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

9/26/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 29 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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BURLINGTON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties, although the Commissioner notes a letter of correction dated October 4, 1988 from David M. Serlin, Esq., attorney for the Board, stating that in the initial decision, ante, there is a typographical error pertaining to the date the policy in question became effective. In correcting this error, the Commissioner notes that the dress code (Exhibit A) correctly states: "This Policy becomes effective January 1, 1988." Said correction is duly noted and incorporated into the Commissioner's decision in this matter.

Upon his careful and independent review of the record before him, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Burlington Township Board of Education's employee dress code is not an arbitrary exercise of the Board's discretionary authority.

In so affirming the ALJ, the Commissioner would note his understanding of the language in the dress code stated at paragraphs I.B and I.C. The former paragraph states:

> B. Male staff members shall wear a dress shirt and tie. Dress or sport jackets, or sweaters, shall be optional and not required.

The latter states:

> C. As an alternative to shirts and ties, males may also wear turtle neck shirts, along with required sport or dress jackets.
> (emphasis supplied)

The Commissioner's reading of the code finds these two paragraphs to be not unreasonable or inconsistent. In so concluding, he interprets the distinction between them to be that if a male wears a dress shirt and tie, he shall not be required to wear a dress or sport jacket or a sweater. However, if, as an alternative to a dress shirt and tie, a male chooses to wear a

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turtle neck shirt, he shall be required to also wear a sport or dress jacket.

With this clarification, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

October 25, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5793-87
AGENCY DKT. NO. 238-7/87

BARBARA GROSSMAN,
Petitioner,
v.
RAMSEY BOARD OF EDUCATION,
Respondent,
and
HERBERT S. MOLLEN,
Intervenor.

Alfred F. Maurice, Esq., for petitioner

Robert M. Jacobs, Esq., for respondent
(Winne, Banta, Rizzi, Basralian & Hetherington, attorneys)

Jerry R. Salerno, Esq., for intervenor
(Aronsohn, Springstead & Weiner, attorneys)

Record Closed: July 7, 1988 Decided: September 27, 1988

BEFORE **KEN R. SPRINGER**, ALJ:

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Statement of the Case

This case presents issues of tenure and seniority. Petitioner Barbara Grossman ("Grossman"), a tenured teacher of business studies, contends that respondent Ramsey Board of Education ("Board") acted improperly when it reduced her hours of employment from full to part-time for the 1987-88 school year. First, Grossman asserts that the Board violated her tenure rights under *N.J.S.A.* 18A:28-5 by assigning an untenured teacher to teach marketing courses which she herself was qualified to teach. Second, she alleges that her teaching certificates authorize her to teach a law course taught by another tenured teacher with less seniority under *N.J.S.A.* 18A: 28-9 *et seq.* Last, she claims seniority credit over various distributive education teachers by virtue of her prior experience as teacher of a sales course.

In response, the Board denies that Grossman holds the appropriate certifications for the particular assignments she seeks. Specifically, it maintains that she lacks the educational services certificate required for the district's marketing program or the social studies endorsement required for the law course. Moreover, respondent contends that the requested relief would infringe upon the Board's prerogative to structure its cooperative vocational program so that the same individual who teaches marketing is also responsible for coordinating student job placements.

For the reasons which follow, Grossman does possess the necessary certificate to teach marketing and must be given employment preference over a teacher without tenure. Her seniority contentions are groundless and will be dismissed.

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Procedural History

On July 29, 1987, Grossman filed her verified petition with the Commissioner of Education ("Commissioner").[1] Respondent Board filed its answer on August 24, 1987. Subsequently, on August 26, 1987, the Commissioner transferred the matter to the Office of Administrative Law ("OAL") for handling as a contested case. At the direction of the OAL, petitioner served notice of the pendency of this matter on other teachers whose interests might be adversely affected by the outcome, namely Herbert S. Mollen ("Mollen"), Donna Kwitchoff ("Kwitchoff") and Robert Cornish ("Cornish"). Mollen obtained leave on March 15, 1988 to intervene in the proceedings. Neither Kwitchoff nor Cornish applied for intervention.

The OAL held hearings on April 26 and May 24, 1988. Each party submitted post-hearing briefs by July 7, 1988. Time for preparation of the initial decision has been extended to September 27, 1988.

Findings of Fact

(1) General Background Facts

Many of the relevant facts are stipulated or undisputed. Barbara Grossman began working for the Board in February 1968. At the time of her initial hire, she possessed an instructional certificate endorsed for "general business studies," which had been issued by the State in March 1966. Between February 1968 and June 1979, she taught a variety of subjects in the business education department at the secondary level, including general business, business mathematics, business law, consumer education and typing. As part of her assignment in the business department, she taught a "selling" course during the 1970-71 and 1972-73 school years. However, in September 1973 the district revised its curriculum to replace the

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[1]Originally the petition consisted of two separate counts: Count I dealt with Grossman's claim for reinstatement to a full-time position; Count II with the extent of her part-time position and the amount of compensation due. At the conclusion of her proofs, Grossman voluntarily withdrew the second count.

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"selling" course with a two-semester "marketing" course. This change coincided with the creation of a distributive education program in the district, described more fully in the next section. Grossman never taught the new "marketing" course. Instead, she continued teaching other business courses as well as typing.

In November 1973, she acquired an instructional certificate endorsed as "teacher of typewriting." Starting in September 1979 and continuing to the hearing date, she has taught nothing else but typing courses. Although in September 1976 she obtained another endorsement as "teacher of distributive occupations," she has never had the opportunity to teach any subjects under this additional endorsement. When she taught "selling" prior to September 1973, she did so under the authority of her "general business" endorsement. Admittedly, Grossman does not hold an educational services certificate entitling her to act as "teacher-coordinator" of a cooperative vocational education program.

Due to declining enrollment in the district, the Board voted to reduce its teaching force for 1987-88 . On or about April 30, 1987, the Board notified Grossman that her employment would be reduced from full to half-time for the upcoming school year. Petitioner does not challenge the good faith of the Board's measure to achieve economy and efficiency. Rather, she attacks the Board's application of the tenure and seniority standards to her particular factual circumstances.

(2) Tenure Claim to
the Marketing Courses

Ramsey school district offers a cooperative vocational education program within its business department. "Cooperative" or "distributive" education, terms used interchangeably during the hearing, consists of an approved arrangement between school and employer whereby a student receives academic or vocational

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instruction for some of the day and related on-the-job training for the remainder.[2] Typically, students take academic courses in the morning and then leave school for the work site in the afternoon. At Ramsey High School, students have a choice of cooperative programs geared to industrial education, office education or marketing. Students enrolled in "marketing co-op" receive classroom instruction which can be applied to their part-time work experience.

Marketing I and II, the courses which Grossman wants to teach, are not formal prerequisites to enrollment in the cooperative marketing program and, in fact, are listed in the curriculum guide as offerings of the regular business department. Nonetheless, both are considered "feeder courses" for students who are or will be taking "marketing co-op." Unlike most vocationally-oriented courses, however, the marketing sequence has broader appeal which extends to those students in college preparatory programs. College-bound students may take marketing alone, without any cooperative component. In the 1987-88 school year, 32 students were enrolled in one of the marketing courses, but only 13 students in "marketing co-op." Those students who follow the full cooperative route often aspire to higher education. Statistics gathered for the Department of Education last year (1986-87) show that 71% of the students in the district's cooperative marketing program went on to further full-time education, compared to only 21% for the cooperative industrial program and 25% for the cooperative office program.

As previously noted, Grossman holds a "general business" teaching certificate with endorsements which allow her, among other things, to teach marketing courses including sales, advertising and retailing. But she lacks an educational services certificate endorsed as a "teacher-coordinator," needed to act as liaison between the school and cooperating employer. In short, Grossman has the necessary qualifications to teach the marketing courses, but not to coordinate student activities on the job site.

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[2] *N.J.A.C.* 6:42-2.1

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School officials describe distributive education in the district as a "unified" program designed so that the same person who teaches the marketing courses is also responsible for supervising its work-study aspects. While the job description adopted by the Board merely calls for an "appropriate New Jersey certification," the occupant of the position has consistently held a "teacher-coordinator" certificate since the program's inception in September 1973. Bruce DeYoung, assistant superintendent for curriculum and instruction, testified that the district's approach has an educational purpose, *i.e.*, to bring examples of real life problems into the classroom discussion. According to DeYoung, the district believes that its marketing students, including those who are not in cooperative education, should be "exposed to teachers with a first-hand knowledge of the job market and the benefit of students' on-site job experience." Along the same lines, high school principal Dr. George Rizzo explained that the academic and work opportunities in the district are purposely interrelated in order to "incorporate practical experience." Splitting the functions of teaching and coordinating between two teachers would, the Board argues, "dismantle" its carefully designed program.

Notwithstanding this testimony, however, the Board itself has divided analogous responsibilities among two or more teachers in the related areas of cooperative education. Illustratively, students in the cooperative industrial education program are taught courses in substantive content areas, such as woodworking, by someone other than the coordinator. Similarly, students in the cooperative office education program are taught accounting by someone other than the coordinator. Clearly, then, the Board does not necessarily require its own teachers to possess a teacher-coordinator certificate in order to teach academic subjects which relate to its cooperative program. The Board's justification for this apparent inconsistent treatment is the difference in the number of college preparatory students in marketing as compared to other vocational programs.

At the time that Grossman was notified of the reduction in her teaching hours, Barbara Kwitchoff taught the two marketing courses. In addition, Kwitchoff served as coordinator of the "marketing co-op" program. Kwitchoff's formal job title was teacher-coordinator of distributive education and she holds the "teacher-coordinator" certificate which the Board says is required for the position. She continued in her duties for the first three months of the 1987-88 school year, at which time she left the district on maternity leave. Without offering Grossman the

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opportunity to teach the marketing courses, the Board posted Kwitchoff's position as vacant and ultimately hired Herbert Mollen to fill the vacancy for the rest of the school year. Like Kwitchoff, Mollen possesses a "teacher-coordinator" certificate. He performed the duties as Kwitchoff's replacement for the remaining seven months of the school year (from December 1, 1987 through June 30, 1988). Of course, Mollen does not have any tenure rights since he is new to the district.

Witnesses for the Board gave contradictory testimony on the extent of any scheduling difficulties if Grossman should prevail. Before the reduction in hours, Grossman taught three or four typing courses per semester. After the reduction, she taught only two-and-a-half typing courses. Since cooperative education students are at their jobs in the afternoon, the marketing courses must be scheduled in the morning. High school principal Rizzo suggested that it would cause a "logistical problem" for Grossman to teach the marketing courses and still retain her typing course load. Significantly, however, he conceded that he could have worked out a schedule giving Grossman a full-time position for 1987-88. If Grossman were assigned the marketing courses, Mollen could have remained as "marketing co-op" coordinator on a part-time basis or that function could have been assumed by the department supervisor who is also fully qualified.

I FIND that the Board's purported educational rationale for depriving a tenured teacher of an assignment within the scope of her certification is unpersuasive. Other teachers in the same district teach related academic courses in the business department without also acting as coordinator of the off-site job program. It takes a different type of skill and ability to teach a class than it does to manage the relationship between student and employer outside of school.

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The fact that a large number of marketing students never enroll in the cooperative program does not support the Board's attempted linkage. To the contrary, it buttresses a finding that marketing is a separate academic subject which can be taught by any teacher who holds the proper credentials to teach the subject matter. Indeed, the Board tacitly recognizes the academic nature of marketing by placing it in the regular business department and opening it to college preparatory as well as vocational students. While practical knowledge and experience may enhance a teacher's attractiveness to the Board, it is not a licensing requirement. Thus, the outcome of this dispute turns not on whether Grossman can serve as coordinator, but on whether her certificate authorizes her to teach marketing. If so, the Board may not legally prefer the services of an untenured teacher over a tenured one.

Nor should a different result be dictated by scheduling considerations, at least where, as here, the change could have been made with a minimum of disruption and inconvenience.

(3) Seniority Claim to
the Practical Law Course

Next, Grossman contends that by virtue of her greater seniority she is entitled to teach a course known as "practical law." At the time of the reduction, this course was part of the district's social studies curriculum and was being taught by one Robert Cornish, who holds an instructional certificate endorsed as a teacher of social studies. Dr. Cornish, who recently joined the district as supervisor of the social studies department, undeniably has less years of service than Grossman. On the other hand, Grossman does not have a social studies endorsement and has never taught the practical law course. Her claim to seniority rests solely on her assertion that the practical law course covers basically the same material as the "business law" course which Grossman had previously taught under her general business certification.

That the district regards "practical law" as distinct from "business law" is readily apparent from the fact that the same student can receive credit for both courses during the same school year. Comparison of the course outlines reveals that

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practical law is much broader, dealing with such topics as constitutional law, criminal procedure and the American justice system, whereas business law is more narrowly focused on contract law and commercial transactions. Areas of overlap between the two, such as the possibility that business law might touch on search and seizure issues in the context of shoplifting, are incidental and extremely limited. Assistant superintendent DeYoung stated that anyone who teaches the practical law course must have a "strong foundation" in the social sciences.

I **FIND** that the two law courses are markedly different in both scope and content. Practical law properly belongs in the social studies department and business law in the business department. Someone who lacks a social studies endorsement does not have the necessary background to teach practical law.

(4) Seniority Claim to Various Courses
Taught by Distributive Education Teachers

Grossman's remaining claim is based on the sales course she taught from February to June 1971 and for the entire 1972-73 school year. Barbara Kwitchoff, a tenured teacher, has a distributive occupations endorsement, and her four years of seniority are credited in the category of "teacher of distributive education." Because of her prior teaching experience in the sales course, Grossman seeks recognition of 15 years and five months of service in the same category. Unlike Kwitchoff, however, Grossman only acquired her distributive occupations endorsement subsequent to her actual teaching experience. When she taught sales, Grossman only possessed an endorsement as a general business teacher, and the Board has already recognized her 19 years and five months of seniority in the category of "teacher of general business." The Board refused to give Grossman any credit in the category of "teacher of distributive education" on the basis that she had "never exercised" her rights under that certificate.

Apart from her seniority claim against Kwitchoff, Grossman also claims rights over other unidentified teachers alleged to have "lesser seniority." But the pleadings fail to specify these other teachers by name. Furthermore, the record is

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devoid of any information about who these teachers are, when they began employment, what certificates they hold, or what they taught.

I **FIND** that Grossman has no teaching experience under her distributive occupations endorsement.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board violated Grossman's tenure rights when it reduced her hours of employment while retaining a nontenured teacher in a position for which Grossman was equally qualified.

Tenure is a statutory status designed to afford teachers "a measure of security in the ranks they hold after years of service." *N.J.S.A.* 18A:28-5. *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Accordingly, the tenure law must be "liberally construed to achieve its beneficent ends." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 74 (1982). It is axiomatic that boards of education may not treat nontenured teachers more favorably than tenured teachers. As between a tenured and a nontenured teacher, the tenured teacher is entitled to retention in a position within his certification. *Bednar v. Westwood Bd. of Educ.*, 221 *N..J. Super.* 239 (App. Div. 1987); *Capodilupo v. West Orange Bd. of Educ.*, 218 *N.J. Super.* 510 (App. Div. 1987). Surely tenure would be "little more than a gesture' if persons without coverage had greater job security than those falling within its protection. *Downs v. Hoboken Bd. of Educ.*, 12 *N.J. Misc.* 345, 17 *A.* 528 (Sup. Ct. 1934), aff'd 113 *N.J.L.* 401 (E. & A. 1934). Long ago, courts declared that a teacher protected by tenure "may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such [tenured] teacher is competent to fill, are retained under employment." *Kearny Bd. of Educ. v. Horan, 11 N.J. Misc.* 751, 753, 168 *A.* 132 (Sup. Ct. 1932).

Nevertheless, the Board attempts to distinguish the *Bednar-Capodilupo* line of cases on the basis that Grossman lacked the proper type of certificate needed for the job. No sound legal or educational reason has been advanced as to why Grossman should need a "teacher-coordinator" certificate in order to teach marketing. Regulations promulgated by the Department of Education provide otherwise.

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N.J.A.C. 6:11-6.2(a)(4)(iv) expressly authorizes the holder of a general business endorsement to teach marketing courses including "sales, retailing [and] advertising." Likewise, *N.J.A.C.* 6:11-6.2(a)(4)(vii) authorizes the holder of a distributive occupations certificate to teach the same subjects. While the coordinating function is vastly different and requires a distinct certificate, the teaching function is virtually identical to the duties which Grossman previously performed as a teacher of sales. Grossman's qualifications to teach marketing are beyond challenge. Simply because the Board would like its marketing teacher to do double duty as coordinator of its cooperative education program does not justify defeating Grossman's rights under the tenure statute.

Alternatively, the Board relies on *Fitzpatrick v. Weehawken Bd. of Educ.*, 1982 *S.L.D.* 1500 (N.J. App. Div. 1982), for the proposition that a school board is not obligated to protect a teacher's tenure rights "by working out all the possible permutations in assignments for which available teaching personnel had credentials and, thus, to restructure, if necessary, its entire teaching staff." 1982 *S.L.D.* at 1501. In *Fitzpatrick*, which involved seniority rather than tenure, petitioners had presented "a complex pattern of transfers which would have accomplished the preservation" of their employment. 1982 *S.L.D.* at 1502. Here, in contrast, Grossman's request is much more modest. Basically, she asks that she be given the marketing courses taught by a nontenured teacher. School law decisions since *Fitzpatrick*, moreover, have acknowledged that a board's duty to recognize a teacher's tenure rights includes "consideration of the reassignment of the affected teacher to assignments filled by non-tenured teachers for which he is qualified." *Data-Samtak v. Scotch Plains-Fanwood Bd. of Educ.*, 1988 *S.L.D.* _____ (Comm'r, Jan. 27, 1988) (slip op. at 18).

Seniority, as distinguished from tenure, provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accordance with sound educational policies. *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362, 368 (1983). *Bednar*, 221 *N.J. Super.* at 242. Pursuant to *N.J.S.A.* 18A:28-13, seniority accrues in "fields or categories" fixed by regulation. There can be no doubt that a reduction of a full to a part-time job constitutes a reduction in force. *Bednar*, at 240. Grossman's seniority claims may be quickly put to rest. Insofar as the practical law course is concerned, Grossman does not have the social studies endorsement which is a precondition for

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the assignment. With regard to her claim as a teacher of distributive occupations at the secondary level, *N.J.A.C.* 6:3-1.10(1)(15) provides, in part, that "Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served." Never having actually served under her distributive occupations endorsement, Grossman does not have any entitlement to seniority in that category. Consequently, she has no seniority claim as against Kwitchoff and others who have served as teachers of distributive occupations.

Order

It is **ORDERED** that the Ramsey Board of Education promptly pay to Grossman any lost salary and other benefits resulting from its failure to offer her the opportunity to teach marketing during the 1987-88 school year; provided, however, that the amount of lost salary shall be mitigated by any earned income which Grossman would not have otherwise received.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 5793-87

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN,** for consideration.

Sept. 27, 1988
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt:

9/27/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1988
DATE

Donald J. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

al

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BARBARA GROSSMAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
HERBERT S. MOLLEN,	:	
INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board and Intervenor Mollen filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner's exceptions, however, were untimely filed as were her reply exceptions. .

The Board posits four exceptions which are summarized, in pertinent part, below.

EXCEPTION ONE

ADMINISTRATIVE LAW JUDGE SPRINGER ERRED WITH RESPECT TO THE RELIEF GRANTED TO PETITIONER FOR THE PERIOD FROM SEPTEMBER 1, 1987 TO DECEMBER 1, 1987

The Board challenges the ALJ's conclusion which would require it to pay petitioner lost salary and other benefits resulting from her not having the opportunity to teach marketing during the 1987-88 school year. While the Board agrees with the ALJ's dismissal of petitioner's seniority claim on the basis of her lack of teaching experience under a distributive occupations endorsement, it argues that the ALJ "improperly applied tenure standards, rather than the seniority standards, in determining that the Board had deprived Mrs. Grossman, a tenured teacher, of an assignment within the scope of her certification, in favor of a non-tenured teacher, the intervenor Mr. Mollen." (emphasis in text) (Board's Exceptions, at p. 3) The Board claims that at least during the period from September 1, 1987 to December 1, 1987, consideration of tenure in this matter was inappropriate since the teacher serving in the disputed position during that period of time, Mrs. Kwitchoff, was a tenured teacher who had greater seniority than petitioner in the category of teacher of distributive occupations. Thus, the Board claims, even in the event that the initial decision

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is affirmed with respect to the period after December 1, 1987, it must be modified to deny any right or remedy to petitioner for the period from September 1, 1987 through December 1, 1987.

EXCEPTION TWO

ADMINISTRATIVE LAW JUDGE SPRINGER ERRED IN DETERMINING THAT RESPONDENT BOARD IMPROPERLY DESIGNED AND IMPLEMENTED A MARKETING COOPERATIVE PROGRAM NOTWITHSTANDING THE EXISTENCE OF AN EDUCATIONAL SERVICES CERTIFICATE CONSISTENT IN ALL RESPECTS WITH SUCH PROGRAM

The Board avers that the ALJ's finding has the result of

> improperly precluding the Board from designing its program, within its managerial and educational discretion, in a manner which is totally and precisely in accordance with the educational concept advanced by the New Jersey State Department of Education by virtue of its approval of the Educational Services Certificate (R-7 in evidence), under which endorsement (as properly found by Judge Springer to be required by the Board in this case) an individual may serve as both the teacher and coordinator of cooperative vocational-technical education in a number of occupational areas, including distributive education. (Id., at pp. 4-5)

Claiming that the record establishes that petitioner does not possess an educational services certificate, the Board contends that petitioner may not acquire seniority within the category of teacher-coordinator, cooperative vocational-technical education programs. The Board cites Livingston Board of Education v. Riker, decided by the Commissioner April 23, 1987 in support of its contention that "the educational services category in which a teaching staff member may earn seniority is, as with the instructional categories, limited by the endorsement required by the State Board of Education, the local Board of Education or, in the case of an unrecognized position, the County Superintendent." (Id., at p. 5) The Board reiterates its position that since its inception, the program in question has been

> consistently designed and operated so as to require, by Job Description (R-5 in evidence) that the individual serving as Teacher/Coordinator of Distributive Education hold the Educational Services Certificate referred to above, namely, the Educational Services Certificate with the endorsement of Teacher/Coordinator, Cooperative Vocational-Technical Education Programs, as specifically provided for in N.J.A.C. 6:11-12.24. (Id., at p. 6)

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It further claims that since 1973 the holder of the position has always been required

> not only to be responsible for the cooperative aspect of the program, under which the individual serves as a liaison between the school and the cooperating employer's training stations, but also is required to teach what were described as the "feeder courses" which lead into the possible participation by students in the Cooperative Program. (emphasis in text) (Id.)

Thus, the Board avers the ALJ improperly determined that it was necessary for the Board to be required to defend its program which it claims was designed and implemented by the Board precisely in accordance with the educational services endorsement issued by the State Department of Education and, further, to require the Board to establish educational rationale for "its determination to not 'dismantle' its unified program." (Id., at pp. 6-7)

EXCEPTION THREE

ADMINISTRATIVE LAW JUDGE SPRINGER ERRED IN GRANTING RELIEF TO PETITIONER BASED UPON CONCEPTS OF TENURE

The Board avows that the ALJ incorrectly interpreted the holding of the Appellate Division in Capodilupo v. West Orange Board of Education, 218 N.J. Super. 510 (App. Div. 1987) in applying tenure considerations to this matter, and claims the holding of the court was

> limited to affirming the rationale of the State Board of Education to the effect that local Boards of Education are obliged to take into consideration the tenure rights of individuals who are affected by a reduction in force, as a result of which tenure rights a tenured teacher is entitled to retention as against a non-tenured teacher for those positions for which his instructional certificate qualifies him. (emphasis in text) (Id., at p. 7)

The Board claims petitioner is entitled to no such right in that she "does not possess that certificate which would entitle her *** to assert a right based upon tenure, in the absence of seniority, over any other individual, whether tenured or non-tenured, to a portion of the unified program created by the Board strictly in accordance with an Educational Services Certificate***. (Id., at p. 8)

EXCEPTION FOUR

ADMINISTRATIVE LAW JUDGE SPRINGER ERRED IN FAILING TO ADOPT THE RATIONALE OFFERED BY THE

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BOARD WHICH ESTABLISHED SOUND EDUCATIONALLY BASED REASONS FOR ITS DECISION TO RETAIN A NON-TENURED TEACHER

The Board again argues that it presented ample reasons to establish a sufficient educational basis upon which to retain a nontenured teacher over a tenured teacher, even assuming the possession of the proper instructional or educational services certificate by such a tenured teacher.

> It is the position of the Board that it presented sufficient persuasive rationale, through the testimony offered by the High School Principal and the Assistant Superintendent for Curriculum and Instruction, for its determination that it is educationally desirable in Ramsey that an integrated marketing cooperative program be implemented under which all of the various aspects of the program, including the marketing courses and the cooperative program itself, be taught by and be under the supervision of one and the same individual, namely, a person holding the Educational Services Certificate specifically created by the New Jersey State Department of Education for that purpose, more specifically the endorsement entitled Teacher-Coordinator, cooperative vocational-technical education programs (R-7 in evidence). (Id., at pp. 8-9)

It counters the ALJ's position that other cooperative education programs in the district split the duties of the program by stating that other cooperative programs offered by the Board are separate and distinct from the cooperative program in issue and are factually distinguishable from the marketing cooperative program. Further, the Board avers that even if found that such programs are not sufficiently distinct from the program in issue, such finding cannot preclude the Board's clear right as a matter of law to design and implement a unified program in this area.

The Board submits that the initial decision rendered should be rejected insofar as said decision recognized any right or entitlement of petitioner by virtue of tenure and/or seniority and also that a final decision in favor of the Board should be rendered.

Intervenor Mollen's exceptions join those filed by the Board. He adds the following:

EXCEPTION ONE

THE ALJ IMPROPERLY CONCLUDED THAT THERE WAS NO EDUCATIONAL RATIONALE FOR REQUIRING THE MARKETING COOPERATIVE DIRECTOR TO TEACH THE RELATED ACADEMIC COURSES.

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Intervenor Mollen avers the record supports the Board's decision to require a cooperative teaching certification for the position of Teacher/Coordinator of Distributive Education.

> The High School Principal and the Assistant Superintendent for Curriculum and Instruction testified that a determination was made by them that it was desirable in the Marketing Cooperative Program to have the individual marketing courses taught and be under the supervision of one and the same individual, namely, a person holding the educational services certificate with the endorsement entitled Teacher Desk Coordinator, Cooperative Vocational-Technical Education Programs.
>
> (Intervenor's Exceptions, at pp. 1-2)

Intervenor Mollen resubmits that such decision was based on sound educational reasons and cites Capodilupo, supra, in support of this position.

Upon his careful and independent review of the record, the Commissioner adopts in part and reverses in part the initial decision for the reasons which follow.

The Commissioner will first address the issue of petitioner's claim to a position teaching marketing in the cooperative education program. The Commissioner finds that petitioner's tenure rights were not violated when the Board assigned a nontenured teaching staff member to teach marketing, and he reverses the ALJ's finding to the contrary. In so deciding the Commissioner notes that the State Board regulations specify a distinction between an instructional endorsement for general business, N.J.A.C. 6:11-6.2(a)(4)iv and that for marketing and distributive occupations, N.J.A.C. 6:11-6.2(a)(4)vii. The former permits the holder to teach "general business studies in all public schools. General business studies normally include: business law, economic geography, economics, social business studies, consumer education sales, retailing, advertising***." The latter endorsement permits the holder "to teach marketing and distributive occupations in all public schools. Distributive occupations include: sales, advertising, retailing***." Moreover, Exhibit J-6B in evidence, lists the word "marketing" among the distributive occupations the holder of an endorsement in distributive occupations may teach, while Exhibit J-6A in evidence does not list "marketing" among the general business study areas one holding that endorsement might teach.

The Commissioner also notes that Intervenor Mollen holds in addition to his educational services certificate an instructional certificate with an endorsement as teacher of marketing education, the precursor to the endorsement of teacher of marketing and distributive occupations. (See J-9A in evidence.) It is further noted that while petitioner holds instructional certificates with endorsements in general business as well as in distributive

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occupations, she has never served under the latter endorsement. The only course remotely similar to marketing petitioner did teach was "Selling," and she taught that course under her general business endorsement, years before obtaining an endorsement in distributive occupations.

The Commissioner finds that to teach "Selling" requires a general business endorsement but that to teach marketing requires the more specifically tailored endorsement known as marketing and distributive occupations. While it cannot be gainsaid that "Selling" is a part of marketing, marketing is a topic much broader than sales, and it requires more technical preparation in its many and diverse aspects. Hence the distinction in the endorsements.

The course petitioner taught designated as "Selling" did not require a distributive occupations endorsement, or its counterpart, at the time she taught it. Because she did not need a distributive occupations endorsement for any course she has taught in the Board's employ, mere acquisition of an additional endorsement in that area, under which she never served does not entitle her to tenure and seniority rights in an area of later-acquired certification. To hold otherwise would entitle those with certifications and endorsements in areas wherein they have not served to assert bumping rights over those who have served under proper certification, in direct contravention to the letter and the spirit of the seniority regulations. See N.J.A.C. 6:3-1.10(1)i; see also, for example, Old Bridge Education Association et al. v. Board of Education of the Township of Old Bridge, Middlesex County; Marilyn Jaclin et al. v. Board of Education of the Township of Old Bridge, decided by the Commissioner August 8, 1985, aff'd State Board January 7, 1987. Moreover, because petitioner does not hold the requisite certification for the position in question, that is, she lacks an educational services certificate with an endorsement in teacher/ coordinator, cooperative vocational-technical education programs, she may not lay claim to that position on the basis of tenure. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). The Commissioner so finds.

Having arrived at this conclusion, the Commissioner need not reach the Board's argument that it had sound educational reasons to hire a nontenured teaching staff member over petitioner in that no tenure claim can be heard from petitioner who did not serve under the appropriate certificate at any time in question.

As to petitioner's seniority claim to the practical law course, the Commissioner adopts as his own the findings and conclusions of the ALJ as found in the initial decision, ante, in this regard.

Finally, concerning petitioner's claim to various courses taught by distributive education teachers, the Commissioner rejects petitioner's seniority arguments for the reasons expressed above. He finds that because petitioner served with appropriate certification and endorsement when she taught "Selling," there is no basis for extending seniority credit beyond that which the Board

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awarded, 19 years and five months in the category of "teacher of general business." Had she for some reason not held appropriate certification and endorsement, there might be some equitable claim to be made that because she was eligible to receive a distributive education endorsement she could be credited in the category of "teacher of distributive education." However, no such circumstances exist. Petitioner never exercised her rights under her later-acquired distributive occupations endorsement by teaching a course requiring that certification and, therefore, she can assert no claim for seniority to which she has no entitlement. The Commissioner adopts the ALJ's finding to this effect as recorded in the initial decision, ante.

Accordingly, the Commissioner rejects that part of the initial decision ordering the Ramsey Board of Education to pay petitioner "any lost salary and other benefits resulting from its failure to offer her the opportunity to teach marketing during the 1987-88 school year***." (Initial Decision, ante) In that petitioner may not lay claim to any of the positions for which she asserts entitlement, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

November 7, 1988

Pending State Board

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BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Board, Wilentz, Goldman & Spitzer
(Robert J. Cirafesi, Esq., of Counsel)

For the Mayor and Council, Patrick J. Diegnan, Jr., Esq.

This matter was opened before the Commissioner by way of a Notice of Motion for Interlocutory Review of an ALJ's denial of the South Plainfield Board of Education's Motion for Summary Judgment. The Board's motion in this matter was predicated upon the fact that when the governing body acted pursuant to N.J.S.A. 18A:22-37 to reduce the current expense and capital outlay portions of the district's 1988-89 school budget after the defeat of the aforesaid budget by the voters of the district, it failed to provide the Board with a list of specific line item reductions and the reasons for effectuating such reductions. Further, the Board points out that it is unrefuted upon the record that the governing body not only failed to provide specific recommended line item reductions and the reasons for same at the time the reductions were made, but also failed to

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provide such a list of specific line item reductions and reasons at the time of the filing of its Answer to the Board's Petition of Appeal to the Commissioner in contravention of N.J.A.C. 6:24-7.5. In support of its motion the Board cites Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and a long line of decisions by the Commissioner and the State Board granting summary judgment in such circumstances where the governing body had failed to provide the specific line item reductions and the reasons for such reductions at the time the reductions were made. See Board of Education of the Township of Union v. Township Committee of the Township of Union, decided by the Commissioner July 9, 1981; Board of Education of the Township of Old Bridge v. Mayor and Council of the Township of Old Bridge, decided by the Commissioner October 28, 1985.

While the Board acknowledges that the Appellate Division in a recent decision in Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 225 N.J. Super. 76 (App. Div. 1988) reversed both the Commissioner and State Board of Education in granting summary decision in favor of the board for failure of the governing body to provide specific line item reductions and reasons at the time the reductions were made, it points out that the Court in Deptford deemed the action of the governing body in supplying reasons at the time it answered the petition of appeal to be in substantial compliance with the intent of the Supreme Court in East Brunswick, supra. Thus, the Board argues that even if the Commissioner is compelled to follow the finding of the Appellate Court in Deptford, the holding in that case requires a finding that the Board is entitled to summary judgment in that the

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governing body in this case by its failure to provide a statement of reasons at the time it filed its Answer as required by N.J.A.C. 6:24-7.5 did not meet the standard for supplying reasons established in the Deptford case. The Board therefore asks the Commissioner to reverse the ALJ and find that the failure to provide specific supporting reasons for its line item reductions at least at the time of the filing of its Answer constituted an arbitrary and capricious action by the governing body and, thus, subject to the granting of summary judgment in its favor.

While filing no further brief in response to the Board's motion, Council relied upon its brief in opposition to the Motion for Summary Judgment before the ALJ. The aforesaid brief argues against the granting of summary judgment on the grounds that summary judgment may not be granted where there are genuine issues as to material facts and where the moving party is not entitled to such judgment as a matter of law. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954)

In support of its position, Council argues that the reduction effectuated by its action was not a significant aggregate reduction and therefore did not require the submission of detailed reasons. Council argues that East Brunswick, supra, stands for the proposition that the statement of reasons is only required where the reduction represents a significant aggregate reduction. In further support of that contention and its assertion of the existence of genuine issues of material facts, Council relies upon Deptford, supra, which held:

> ***Without a hearing on the merits to determine if the reduction of $183,300 was warranted, it cannot even be argued that the reductions would

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> have a significant effect on any educational process in the township.*** (at 86)

Based on the foregoing, Council contends that its total reduction in the 1988-89 budget of $790,369 out of a proposed total budget of $23,813,260 and representing approximately 3.3 percent did not represent "a significant aggregate reduction" (Brief, at p. 8) and that if the Board believed that it did represent a significant amount that was a fact specific matter to be determined through the hearing process.

Further, Council argues that it is required to give notice of its reasons only after an appealable controversy arises. Council claims that, until Deptford, no court has resolved the precise time when the reasons must be provided. In the instant matter, the reasons were provided through the discovery process at the Office of Administrative Law and in sufficient time to permit the Board to prepare its case. Essentially, Council argues that it, like the Board, shares a responsibility to the public and that matters of such import as to the amount of taxes necessary to support the public schools of the community should not be decided upon narrow procedural lines.

The Commissioner has carefully reviewed the arguments raised by the parties in this matter. In addition, the Commissioner has reviewed the Order of the ALJ denying summary judgment.

In so doing, the Commissioner notes the following findings by the ALJ:

> Although I recognize that in the Deptford case, the governing body did submit its written reasons for the reductions with its answer, I CONCLUDE that the same rationale is applicable in this matter. Although the specific reasons were not attached to the answer they were submitted during

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> the period allowed for discovery and the petitioner is not prejudiced since it has sufficient time to review these reasons before the hearing.
>
> In its briefs, the petitioner notes that pursuant to N.J.A.C. 6:24-7.5, the respondent was specifically required to file its reasons for the budget reductions with its answer. Although I recognize that the respondent has not complied with this requirement, I CONCLUDE that this noncompliance is not a substantial defect and therefore does not warrant the granting of a summary decision, which would include the restoration of the school budget reductions made by the respondent without a hearing. As stated by the Appellate Division in the Deptford case, the right of the taxpayers, through the respondent, to be heard on the merits should not be foreclosed because of a procedural requirement. Further, I recognize that the petitioner did receive this information as part of discovery, pursuant to N.J.A.C. 1:6-10.1, in sufficient time prior to the hearing to avoid any prejudice to its case.
>
> In addition, I agree with the respondent's argument that there is a factual issue in this matter as to whether the respondent's reductions constitute a "significant aggregate reduction" as used in the East Brunswick case. On a percentage basis, a three-percent reduction of the total budget does not appear significant; however, specific reductions may be significant and may adversely affect the petitioner's ability to provide a thorough and efficient system of education, Deptford, at 86. Since the parties disagree as to whether the reductions are significant, I also CONCLUDE that it is necessary for there to be a hearing to settle this issue.
>
> For the reasons given above, I ORDER that the petitioner's motion for summary decision be DENIED. (Order, at p. 6)

Notwithstanding the determination of the ALJ in this matter that Council's failure to comply with the timeline established in Deptford does not represent a substantial defect, the Commissioner disagrees. In so doing, the Commissioner notes that the Deptford Court relied heavily upon the State Board's own rule, N.J.A.C.

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6:24-7.5, in determining that respondent in that case had substantially provided a timely answer. Herein, the ALJ stretches the rule even further by holding that Council has provided adequate notice of its reasons during the discovery process some four and one-half months after the original reductions were made. In so doing, the ALJ argues that the Board has suffered no substantial harm when the statement of reasons was provided on September 7, 1988 in preparation for the opening of hearings on October 17, 1988; the Commissioner cannot agree.

The Commissioner must accept the Appellate Court's finding in Deptford that the filing of the reasons for reductions with the answer to the petition represents a substantial compliance with the Supreme Court's admonition that

> ***the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.
> (East Brunswick, at 106)

However, he cannot accept the ALJ's conclusion that Council in this matter be permitted to further stretch the permissible timeline beyond the filing of the Answer as required by Deptford. To accept additional excusal of Council's failures in this manner represents a further erosion of the Supreme Court's requirement that the Board and the Commissioner be promptly notified of the reasons for the reductions effectuated. While Council's failure to provide the reasons at the time of the reductions may be excused by the Appellate Division's findings in Deptford and the rules of the Commissioner and the State Board, to ignore both the Court and the rules represents an arbitrary and capricious act on the part of the governing body. While the Commissioner is mindful of the Deptford

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Court's admonition relative to not granting summary judgment on purely procedural grounds, the actions of Council in this matter do not represent a mere procedural violation but, in fact, go to the very heart of whether Council has met its constitutional responsibility to consider the budget and certify an amount of taxes necessary to assure a thorough and efficient system of education.

Further, to accept Council's argument that reasons are only required when the reductions represent a substantial aggregate reduction would, in effect, permit any amount of reduction to be made without reason so long as the governing body argued that it did not represent a significant aggregate reduction. In regard to such position, the Commissioner agrees with the Board's brief wherein it argues as follows:

> Surely the Supreme Court here was not laying down conditions as to the appealability vel non of a governing body's actions, but rather, was simply referring to those cases in which significant reductions do occur which cause a board of education to file an appeal. It is illogical to assume that, for instance, insignificant aggregate reductions can be arbitrary, i.e., that no reasons for such reductions are necessary. It follows, therefore, that the governing body must have some expressed rationale or underlying reasons for all reductions which it effectuates. Whether the reductions in the aggregate are "significant" or "insignificant" is really the ultimate decision in each case on appeal. The standard still is whether the governing body acted properly in determining what amount of funding is "necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district...." N.J.S.A. 18A:22-37. The right of appeal to the Commissioner from any such determinations granted to the Board of Education by N.J.S.A. 18A:22-38 is clearly not conditioned upon whether the reductions by the governing body are "significant in the aggregate." The statute contains no such language and the Supreme Court certainly did not intend to impose its own absolute precondition to the right of appeal.

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> For Judge Tylutki to rule, therefore, that there must be a hearing as to whether the reductions are significant or not places the proverbial cart before the horse. To put the matter another way, if all of the reductions were made in an arbitrary and capricious fashion, i.e., without any reasons, then as a matter of law they must be set aside whether they were significant in the aggregate or not.
> (Board's Letter Memorandum, at pp. 16-17)

Consequently, the Commissioner reverses the ALJ's Order denying summary judgment and grants summary judgment to the Board for the reasons contained herein. The Commissioner directs that the amounts in dispute in this matter, $276,751 in current expense and $315,000 in capital outlay, be restored to the Board of Education of the Township of South Plainfield and he further directs that the Middlesex County Board of Taxation restore the aforesaid amounts to the local tax levy.

Accordingly, the Commissioner establishes the local tax levy for the 1988-89 school budget in the Borough of South Plainfield as follows:

Current Expense	$18,818,608
Capital Outlay	999,916

IT IS SO ORDERED this 7th day of November.

COMMISSIONER OF EDUCATION

NOVEMBER 7, 1988

DATE OF MAILING, NOVEMBER 9, 1988

Pending State Board

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BOARD OF EDUCATION OF THE CITY OF HOBOKEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Board, Murray & Murray
(Karen A. Murray, Esq., of Counsel)

For the Mayor and Council, Eugene P. O'Connell, Esq.

This matter was opened before the Commissioner of Education by the Board of Education of the City of Hoboken (Board) on May 26, 1988 through the filing of a Petition of Appeal pursuant to the applicable provisions of N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.1 et seq.

In its petition the Board alleges that the current expense tax levy line item reduction of $2,812,690 imposed on its 1988-89 school budget request by the Mayor and Council of the City of Hoboken is arbitrary, capricious and contrary to the provisions of N.J.S.A. 18A:22-37 as enunciated in prior school law decisions rendered by the Commissioner and the Courts. Council's Answer to the Board's pleadings was filed with the Commissioner on June 6, 1988.

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On June 17, 1988 the Commissioner directed to me, Vincent Calabrese, Assistant Commissioner, Division of Finance, the following Memorandum:

> Based upon the experience of the 1987-88 budget appeals, it has become apparent that a process is required to expedite the hearings and the rendering of a final decision in those appeals which involve districts which are in or entering Level III monitoring.
>
> Since the amounts by which the budgets in those districts have been reduced may impact upon the ability of the districts to meet the requirements of their corrective action plan and thus impede their ability to ultimately meet the responsibility of providing a thorough and efficient system of education, it is essential that the districts be permitted to have their appeals heard in sufficient time to be able to utilize any funds they may be able to justify in a hearing within the school year in which they have originally been budgeted. Under existing procedures, several Level III districts did not resolve their budget appeals for the 1987-88 school year until April or May of 1988 when they were already in process of appealing reductions in their 1988-89 budgets.
>
> In light of the above circumstances, I have determined to retain these matters for hearing pursuant to N.J.S.A. 52:14F-8 and N.J.A.C. 6:24-7.7(b). I am, pursuant to N.J.S.A. 18A:4-34, further designating you to hear and decide the budget appeals controversies in those cases involving districts in the Level III monitoring process. (C-1)

The parties were subsequently notified by me of the Commissioner's decision and on July 8, 1988, I convened a prehearing conference with their legal representatives over the telephone and issued a written prehearing order to them dated July 11, 1988.

The primary issue to be resolved as agreed upon by the parties and made part of the prehearing order is as follows:

> Whether the municipal council reduction of $2,812,690.00 from the 1988-89 current expense budget of the Hoboken Board of Education was

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> arbitrary or capricious, and does the reduction preclude the Hoboken Board of Education from providing its pupils a thorough and efficient system of education? (Prehearing Order, at p. 1)

At the time of the prehearing conference the parties further agreed that all discovery would be completed by July 22, 1988 pursuant to the provisions of N.J.A.C. 1:6-10.1. However, on July 22, 1988 at the request of the attorney for Council, I notified the parties that the time for the completion of discovery would be extended until July 27, 1988.

On July 26, 1988 the Board filed a Motion for Summary Judgment in its favor with supporting brief and certification of Anthony Curko, Board Secretary/School Business Administrator. The Board's motion was further supplemented by a letter memorandum filed on August 1, 1988. On August 2, 1988, oral argument by the parties on the Board's motion was heard at the Department of Education in Trenton. The main thrust of the Board's argument in support of its motion focused upon the resolution of Council adopted on April 26, 1988 wherein Council determined to certify to the Hudson County Board of Taxation a sum of $13,053,913 in current expense appropriations for the 1988-89 school year. This amount is $2,812,690 less than the Board had requested in current expenses.

The specific current expense line item reductions delineated by Council in its resolution of April 26, 1988 are as follows:

[ACCT] LINE ITEM BREAKDOWN

[110] #47	-	5,290	no raise for superintendent
	-	81,295	eliminate ass't superintendent
	-	18,098	eliminate one clerk from sup't office
	-	36,105	eliminate two clerks from secretary's office

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[ACCT] LINE ITEM BREAKDOWN

	-	10,100	reduce secretary's salary to $55,000
	-	2,500	eliminate custodian of school money
	-	5,000	eliminate p-t salary from business office
sub-tot:		158,388	
[120] #48	-	20,000	eliminate architect's fee
	-	15,000	reduce legal fees
	-	23,500	reduce computer costs
sub-tot:		58,500	
[130] #49	-	10,500	eliminate other expenses
	-	2,600	reduce supplies for sup't
	-	2,600	reduce supplies for secretary
	-	5,000	reduce advertising and printing
sub-tot:		20,700	
[211] #51	-	62,551	eliminate one principal
	-	219,415	eliminate four vice-principals
sub-tot:		281,966	
[212] #52	-	11,000	reduce summer funds to 10% of four staff
[213] #53	-	400,000	reduce teachers by 16
	-	50,000	staff development
	-	25,000	subs
	-	31,999	desegregation specialist
	-	49,391	music coordinator
	-	3,840	phys ed coordinator
	-	3,840	art coordinator
sub-tot:		564,070	
[214] #54	-	45,296	eliminate one social worker
	-	48,928	eliminate one learning disability consultant
	-	27,292	eliminate one psychologist
	-	27,732	eliminate one guidance counselor
sub-tot:		149,248	
[215] #55	-	98,210	eliminate five clerks
[220] #57	-	12,262	10% cut
[230] #58	-	5,401	10% cut
[240] #59	-	54,157	10% cut
[310] #62	-	95,034	eliminate 2 attendance and 4 enforcement officers

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[ACCT] LINE ITEM BREAKDOWN

[410]	#64 -	22,830	eliminate one nurse
[510]	#67 -	26,895	eliminate one driver and one attendant
[550]	#73 -	2,055	10% cut
[610]	#75 -	14,026	eliminate head custodian stipend
	-	52,228	eliminate two engineers
	-	172,012	eliminate nine custodians
	-	97,063	eliminate seven matrons
	sub-tot:	355,329	
[630]	#77 -	30,000	close second school
[640]	#78 -	35,000	close second school
[650]	#79 -	11,300	close two schools plus 10% cut
[710]	#82 -	6,360	eliminate one p-t electrician
	-	20,500	eliminate one electrician
	-	54,902	eliminate two plumbers
	-	146,353	eliminate six carpenters
	sub-tot:	228,115	
[720]	#83 -	37,000	close second school plus 10% cut
[730C]	#85 -	132,346	eliminate
[740]	#86 -	16,384	close second school plus 10% cut
[810, 820 & 820B]	#88-#90		
	-	97,143	43 non-cert. ss, unem, pen, 12%
	-	142,296	43 non-cert. health 3300/staff
	-	13,686	40 cert. unem 1.2%
	-	132,000	40 cert. health 3300/staff
	sub-tot:	385,125	
[1020]	103 -	21,375	10% cut

TOTAL REDUCTIONS $2,812,690.00
(Board's Petition, Exhibit A)

At the time of oral argument on August 2, 1988, the Board set forth a chronology of events following the defeat of its 1988-89 school year budget on April 5, 1988 and argued that the undisputed

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facts contained in the record developed thus far entitled it to summary decision setting aside the current expense reductions made by Council as a matter of law. The Board argued further that Council's reductions to its budget made on April 26, 1988 violated the procedural requirements set forth in N.J.S.A. 18A:22-37 as well as the progeny of school law decisions rendered by the Commissioner and the Courts emanating from the landmark decision by the New Jersey Supreme Court in Board of Education of the Township of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94 (1966).

More specifically, the Board argued that Council failed to arrive at an independent determination with regard to the enumerated line item reductions contained in its resolution of April 26, 1988 and, further, that it failed to provide the Board with its underlying reasons for each of those line item reductions contested herein. The undisputed facts upon which the Board relied in support of its Motion for Summary Judgment are the certification of Anthony Curko, attached to its supporting brief, Council's resolution of April 26, 1988 setting forth its line item reductions (Petition, Exhibit A), Board's letter of July 26, 1988 in support of its motion with attached minutes of Council's meeting of April 26, 1988 (Exhibit A) and Council's reasons for its line item reductions filed with the Commissioner on July 27, 1988.

Council argued the Board failed to satisfy the standards for summary judgment. Council maintained that it properly articulated its determination and supporting reasons for each reduction made in the school budget in its resolution of April 26, 1988 and, furthermore, Council maintained that the Board was fully

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apprised of the budget reductions as well as the underlying reasons of Council for making such reductions prior to the time it adopted its resolution of April 26, 1988. Council submitted the certification with attachments of Robert Ranieri, President of City Council, and letters dated May 9 and May 13, 1988 from Superintendent of Schools Walter Fine to Louis Accocella, Hudson County Superintendent of Schools, upon which it relied in support of its opposition to the Board's motion. Council maintained that it was prepared to submit further certifications of witnesses who would testify as to the disputed facts and circumstances which support its contention that the Board had prior knowledge of those reasons upon which it relied in adopting Council's resolution of April 26, 1988 setting forth Council's current expense line item tax levy reduction of $2,812,690 for the 1988-89 school year.

At the conclusion of oral argument on the Board's Motion for Summary Judgment, I ruled that a decision on the motion would be deferred and that this matter would proceed to a hearing on the merits of the Board's charges. Council's written brief in opposition to the Board's Motion for Summary Judgment and additional certifications of Board members Gerard Costa and Joseph Rafter were filed on August 8, 1988.

Five days of hearing were held in this matter. The first day of hearing was held at the Department of Education on August 10, 1988. The next two succeeding days of hearing were held at the Office of Administrative Law, Newark, on August 11 and 12, 1988. The last two days of hearing were held at RCSU-Central, Old Bridge on August 23 and October 14, 1988. For the purpose of clarification a list of witnesses is identified below indicating the dates upon

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which their testimony was taken together with numbered sides of the cassette tapes wherein their testimony is recorded.

WITNESS	DATE	TAPE SIDE #
Walter Fine, Supt. (Board)	8/10/88 8/11/88 8/12/88	6-12 13-19 20-22
Francis McGorty, Asst. Supt. (Board)	8/12/88	23-24
Anthony Curko, Secretary/Bus. Adm. (Board)	8/23/88	25-30
Dr. Victor Crespy, Ed. Consultant (Board)	10/14/88	31-35
Gerard Costa, School Board Member (Council)	10/14/88	35-38
Joseph Rafter, School Board Pres. (Council)	10/14/88	38
Thomas Newman, Council Member (Council)	10/14/88	38

Subsequent to the conclusion of Superintendent Walter Fine's testimony on August 12, 1988 it was agreed that the certifications of the remaining witnesses would be accepted in the record in lieu of their direct testimony. Therefore, the testimony of these witnesses which appears on the tape cassettes identified previously relates to cross-examination and re-direct examination by counsel for the respective parties.

Prior to the first day of hearing on August 10, 1988 Council had filed a Motion for Recusal with supporting certification and brief to have the Commissioner recuse himself from these proceedings and to have this case heard and decided by an Administrative Law Judge through the Office of Administrative Law. The Board opposed this motion in writing.

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In support of its motion, Council relied on the provisions of N.J.A.C. 1:1-14.12 which require a judge to withdraw from participation in any proceeding in which he/she is interested in the outcome or where other reason exists that a fair and unbiased hearing might not be conducted. Council claimed that the Commissioner had an interest in the outcome of these proceedings by virtue of the fact the Board could possibly use any budget reduction approved as a defense in any subsequent action by the Commissioner for a takeover of the Hoboken School System.

I denied Council's motion on the record (Cassette Tape, Side 5, 8/10/88) relying on prior court rulings which hold that:

> A judge is not required to withdraw from the hearing of a case upon a mere suggestion that he is disqualified to sit. Indeed, ***"it is improper for him to do so, unless the alleged cause of recusation is known by him to exist or is shown by proof to be true in fact."***

(Clawans v. Schakat, 49 N.J. Super. 415, 420 (App. Div. 1958) quoting State v. De Maio, 70 N.J.L. 220, 222 (E. & A. 1904))

On August 12, 1988, the third day of hearing in this matter, Board counsel filed a Motion for the Dismissal of Specified Cuts related to the closing of a second school which was part of the overall reductions imposed on its 1988-89 school budget in Council's resolution of April 26, 1988. The Board's motion was accompanied by a supporting letter brief and the certification of its Superintendent Fine. The Board's motion originally stated the amount of such line item reductions requested to be restored to its budget as $1,597,131. Subsequent to hearing oral argument by the parties with respect to the Board's motion, I deferred my ruling until such time as Council could review and prepare an appropriate

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reply to each of the line item reductions suggested to be restored by the Board. Council filed its opposing letter reply brief to the motion with a certification of its attorney on August 15, 1988. Council maintained at that time that the total amount of the specified line item reductions pertaining to the closing of a second school was $350,000, rather than that which was arrived at by the Board. The Board also filed a letter reply to Council's opposing brief on August 15, 1988. I conferred with the parties by telephone on August 15, 1988 and advised them that my ruling would be made on our next scheduled day of hearing on August 23, 1988.

I granted the Board's Motion for the Dismissal of Specified Cuts with regard to the closing of a second elementary school for the 1988-89 school year. Based on the certification submitted by the parties and the arguments presented at that time, it was determined that the following current expense line item reductions related to the closing of a second elementary school be restored in whole or in part:

LINE	ACCT. #	ORIGINAL COUNCIL REDUCTION	REASON GIVEN	AMOUNT RESTORED	AMOUNT DEFERRED FOR CONTINUED HEARING
51	211 -	62,551 -	Eliminate 1 principal	62,551	- 0 -
53	213 -	400,000 -	Reduce teachers by 16	400,000	- 0 -
		25,000 -	Subs	25,000	- 0 -
62	310 -	95,034 -	Eliminate 2 attendance & 4 enforcement officers	12,875	82,159
64	410 -	22,830 -	Eliminate 1 nurse	22,830	- 0 -
75	610 -	52,228 -	Eliminate 2 engineers	24,214	28,014
		172,012 -	Eliminate 9 custodians	92,516	79,496
77	630 -	30,000 -	Close second school	30,000	- 0 -
78	640 -	35,000 -	Close second school	35,000	- 0 -
79	650 -	11,300 -	Close 2 schools plus 10% cut	4,500	6,800
83	720 -	37,000 -	Close second school plus 10% cut	13,220	23,780

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86	740 -	16,384 - Close second school plus 10% cut	4,500	11,884
88-89	810, 820 & 820B -	634,272 - Fringe Benefits*	140,796	493,476
TOTALS		1,593,611	868,002	725,609

* Figures adjusted to correct fringe benefit calculation to reflect the ratio of total salaries to total fringe benefits on lines 88-90 rather than the limited sample discussed at the hearing.

Total reduction by Council	2,812,690
Amt. restored due to school closing ruling	725,609
Balance	2,087,081

Although the Commissioner normally would not interject himself into the closing of a school during the budget process, it is apparent that the magnitude of Council's reductions would force serious consideration of closing an additional school facility.

If a school were not closed, the reductions, coupled with the need to meet Level III requirements, would have a serious negative impact on the Board's ability to provide a thorough and efficient system of education.

Assuming arguendo that a hearing on the merits would establish that closing a school were possible, the need for rescheduling, public hearings, redistribution of funding, staff and pupil reassignments would result not only in turmoil but a distinct probability that the school system would not be able to open on its scheduled opening date, to say nothing of the trauma parents would experience when informed of pupil reassignments at this late date.

The combined negative impact of these factors would seriously undermine student performance and destroy the credibility of the Board with parents, students, teachers, staff and the community at large.

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The Board also made a further application which was granted by me to exclude those line item reductions imposed by Council pertaining to arbitrary 10% line reductions:

LINE	ACCT	ORIGINAL COUNCIL REDUCTION	REASON GIVEN	AMOUNT RESTORED BASED ON SCHOOL CLOSING RULING	ADDITIONAL AMOUNT RESTORED DUE TO ARBITRARY 10% LINE ITEM REDUCTIONS	AMOUNT DEFERRED FOR CONTINUED HEARING
52	212	11,000	Reduce summer funds to 10% of four staff	- 0 -	11,000	- 0 -
57	220	12,262	10% cut	- 0 -	12,262	- 0 -
58	230	5,401	10% cut	- 0 -	5,401	- 0 -
59	240	54,157	10% cut	- 0 -	54,157	- 0 -
73	550	2,055	10% cut	- 0 -	2,055	- 0 -
79	650	11,300	Close two schools plus 10% cut	4,500	6,800	- 0 -
83	720	37,000	Close second school plus 10% cut	13,220	23,780	- 0 -
85	730C	132,346	Eliminate	- 0 -	132,346	- 0 -
86	740	16,384	Close second school plus 10% cut	4,500	11,884	- 0 -
103	1020	21,375	10% cut	- 0 -	21,375	- 0 -
					281,060	

Net reductions after application of school closing ruling	2,087,081
Restoration due to arbitrary 10% line item reductions	281,060
Balance	1,806,021

Finally, at the hearing of October 14, 1988 the Board moved to exclude those current expense line item reductions imposed by Council pertaining to requested appropriations for the 1988-89 school year for the implementation of mandated Level III monitoring program requirements. (Tape Cassette, Side 31) After hearing the respective arguments of Council pertaining to the Board's motion, I granted the motion to restore the following amounts related to the Board's mandated Level III program operations for the 1988-89 school year:

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LINE	ACCT	ORIGINAL COUNCIL REDUCTION	REASON GIVEN	AMOUNT RESTORED BASED ON SCHOOL CLOSING & ARBITRARY 10% REDUCTION RULING	ADDITIONAL AMOUNT RESTORED FOR LEVEL III	AMOUNT DEFERRED FOR CONTINUED HEARING
47	110	81,295	Eliminate asst. supt.	- 0 -	81,295	- 0 -
		2,500	Eliminate custodian of school money	- 0 -	2,500	- 0 -
48	120	23,500	Reduce computer cost	- 0 -	23,500	- 0 -
53	212	50,000	Staff development	- 0 -	50,000	- 0 -
					157,295	

Net reduction after application of school closing and 10% arbitrary reduction ruling	1,806,021
Restoration Level III	157,295
Amount deferred for continued hearing	1,648,726

At the hearing of October 14, 1988 I also heard the full testimony of Dr. Victor Crespy, Board's expert witness (Tape Cassette, Sides 31-35) as well as the testimony on cross-examination of the certifications of Council's witnesses Gerard Costa (Board Member) (R-4) (Tape Cassette, Sides 35-38), Joseph Rafter (Board President) (R-3) (Tape Cassette, Side 38) and Thomas Newman (Council Member) (R-2) (Tape Cassette, Side 38). Council's expert witness, Debra S. Weiner, could not be present on this day. However, her certification (R-5) was admitted in evidence at that time.

Based on the testimony offered by Gerard Costa, Joseph Rafter and Thomas Newman, the following facts are undisputed in the record:

1. Board Members Costa, Flora-Distaso and Rivera sought election to the Hoboken Board of Education on a platform to reduce the proposed budget for the 1988-89 school year.

2. The platform to reduce the budget was not based on a reasoned analysis of the proposed

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line items of appropriation, the need for such amounts in the achievement of the goals and objectives of the Hoboken Board of Education under Chapter 212 of the Laws of 1975 or the impact a budget reduction would have on such goals and objectives.

3. After election to the Board of Education on April 5, 1988, Vivian Flora-Distaso, Felix Rivera and Gerard Costa were appointed by Board President Joseph Rafter to the Board's budget committee at the reorganization meeting held on April 19, 1988.

4. On or about April 25, 1988 the budget committee met with the full Board of Education to discuss budget reductions to the 1988-89 school budget totaling $2,812,690. The full Board voted not to accept these reductions.

5. On April 25, the Board's budget committee met with a committee of the City Council and discussed reductions of $2,812,690 to the Board's budget, even though not authorized by the Board to enter into such negotiations. As a result of that meeting the committee of the City Council accepted the list of budget reductions totaling $2,812,690, including an arithmetic error of $1,000 in reductions made to the 710 acct line 82.

6. On April 26 at a special meeting of the Council a resolution was adopted listing the precise reductions proposed by the Board's budget committee and rejected by that Board. Minutes of that meeting clearly show that Council did not understand the implications of the reductions and in fact were relying on the Board's committee to lend credence to its action.

7. Although testimony by Mr. Costa indicated that Council's budget committee was fully aware that he and his committee were not authorized to conduct negotiations involving $2,812,690, it was clear that Mr. Newman and Council relied on the affiliation of the Board's budget committee to the Board of Education to lend credence to the proposed reductions contained in Council's resolution adopted on April 26, 1988. (Tape 10/14/88, Sides 35-36)

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8. The purported reasons contained in Council's resolution were mere directives and did not reflect an independent analysis of the appropriations necessary for educational programs.

9. Council's reductions were primarily based on voter reaction and tax impact irrespective of educational need.

10. Council did not ever attempt to consult with the Board of Education but instead relied on the Board's committee to effect reductions not authorized by the Board in violation of N.J.S.A. 18A:22-37.

11. Council did not at any time attempt to make an independent determination of the full amount needed for educational purposes, let alone individual line item recommendations required under 18A:22-37.

12. Reasons offered by Council on April 26, 1988 were inadequate, did not reflect a reasoned review of educational need and in fact were the same reasons proposed by the Board's budget committee to the Board of Education.

13. The record clearly establishes that Council also did not file line item reductions with adequate reasons with its answer on June 6, 1988, in violation of N.J.A.C. 6:24-7.1.

14. Reasons finally filed by Council on July 26 were out of time and must be rejected. Assuming arguendo that the reasons should be considered, they did not represent an adequate response under 18A:22-37. Those reasons were basically the same reasons advanced by the budget committee to the Council's school budget committee on April 25, 1988 with little, if any, amplification or clarification, thereby suffering the same fatal flaw as the original reasons offered.

In view of the above findings, it is evident that Council's actions were contrary to specific mandates recited by the courts and the Commissioner which appear in pertinent part below:

> The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be

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> independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. (emphasis supplied)
> (East Brunswick, supra, at 106)

And Board of Education of the Township of Irvington v. Mayor and Council of the Township of Irvington, Essex County, decided by the Commissioner October 30, 1987, affirmed State Board April 6, 1988:

> We also reject the Council's contention that it was not required to provide reasons because its reasons were both obvious and known to the Board from the context of meetings and public statements made by Council members. Such comments do not constitute a coherently articulated rationale supporting the reduction of specific line items of the budget so as to enable the Board to respond and to provide the assurance that when the Council acted it did so conscientiously to effect those savings that would not impair the educational process. [cites omitted] (State Board's Slip Opinion, at p. 4)

After a careful consideration of the evidence on the record, the testimony and certification of all witnesses and a review of the Board's educational and fiscal needs, I find and determine that the reductions made by the Municipal Council of the City of Hoboken are deemed to be arbitrary, capricious and in violation of statutory prescription and applicable case law.

Accordingly, I have determined that it is unnecessary to render further findings and determination with regard to the remaining amounts contested herein. I hereby grant Summary Judgment in favor of the Board of Education of the City of Hoboken based upon the undisputed facts recited herein and supported on the record.

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The Hudson County Board of Taxation is hereby directed to include an amount of $2,812,690 in the current expense tax levy of the City of Hoboken for educational purposes for the 1988-89 school year.

The amount of $2,812,690 in current expense appropriations when added to the original tax levy of $13,053,913 certified by Council for the 1988-89 school year shall total $15,866,603.

IT IS SO ORDERED this 9th day of November 1988.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 9, 1988

DATE OF MAILING - NOVEMBER 10, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4294-88

AGENCY DKT. NO. 127-5/88

ALAN R. SITEK,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals & Supervisors Assoc.)

Franklin H. Berry, Jr., Esq., for respondent (Berry, Kagan, Privetera & Sahradnik, attorneys)

Record Closed: August 20, 1988 Decided: October 4, 1988

BEFORE **RICHARD J. MURPHY,** ALJ:

Petitioner Alan R. Sitek, appeals to the Commissioner seeking reinstatement to his former position as principal of the Southern Regional School District. He claims that he had required tenured under N.J.S.A. 18A:28-6 by virtue of his two years service as a vice-principal and almost three years as principal before his termination in June of 1988. The respondent Board claims that Sitek did not serve a sufficient period of time in either capacity to receive tenure under the statute. Both parties have moved for

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summary decision, which is granted for the petitioner who is ordered reinstated to his position as principal with backpay.[1]

The facts needed to decide the motions for summary decision are not in dispute. Alan Sitek, who is certified as both a vice-principal and prinicipal, began employment as a vice-principal in the Southern Regional Middle School on July 1, 1983 and served there until he was transferred, with his consent, on July 1, 1985 to the position of principal of Southern Regional Middle School. Almost on April 28, 1988, three years later, the superintendant of schools notified petitioner that the Board of Education had voted to terminate his employment on sixty days notice effective June 28, 1988, approxiamtely three days before he would have completed his third year as principal. The Board based its termination on the contract and did not utilize any of the procedures required by N.J.S.A. 18A:6-10, et seq., for discharge of a tenured principal. There is thus no dispute that the petitioner served two years as vice-principal, and, upon his voluntary transfer, served just short of three years as principal of the Southern Regional Middle School. The Board of Education concluded that petitioner did not obtain tenured as either vice-principal or principal and thus was subject to termination under his employment contract.

The issue is whether the petitioner obtained tenure, either as vice-principal or proncipal under the provisions of N.J.S.A. 18A:28-6:

> 18A:28-6. Tenure upon transfer or promotion
>
> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) The expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

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1 By way of procedural history, this matter was transmitted to the Office of Administrative Law for hearing as a contested case on June 14, 1988, and a prehearing conference was held on August 19, 1988. Petitioner moved for summary decision prior to the prehearing conference on July 20, 1988, and the respondent cross filed on August 1, 1988. The record closed on August 20, 1988.

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> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

Alan Sitek argues that he acquired tenure as both a principal and vice-principal in the Southern Regional School by virtue of his five calendar years of consecutive employment. As to the position of principal, Sitek contends that he has met the requirements of N.J.S.A. 18A:28-6 because he was "eligible to obtain tenure" within the meaning of that section and served upon transfer for a period in excess of the two consecutive calendar years of service required by the above provision. Petitioner seeks reinstatement to his former position as a principal. He also seeks tenure as a vice-principal under N.J.S.A. 18A:28-6.

Respondent argues that petitioner, despite having served in the district for five years, is not entitled to tenure in either position because he did not serve for a period of three calendar years or three academic years as either vice-principal or principal. The Board contends that, because petitioner never acquired tenure as a vice-principal under N.J.S.A. 18A:28-5, he was therefore not eligible for tenure upon transfer within the meaning of N.J.S.A. 18A:28-6. The respondent Board relies on Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 80-81 (1982) in arguing that tenure can only be achieved by satisfying the requirements set forth in N.J.S.A. 18A:28-5, including that of service for three consecutive calendar years or three consecutive academic years, in a position together with employment at the beginning of the next year. Since petitioner admittedly did not satisfy this requirement in his two years service as a vice-principal, the Board reasons that he was not under tenure or eligible for tenure at the time of his transfer and thus can

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not claim tenure under N.J.S.A. 18A:28-6 by virtue of his almost three years service as principal.

Petitioner contends that both N.J.S.A. 18A:28-5 and N.J.S.A. 18A-28-6 are to be read together so that in the event that an individual eligible for a tenure is transferred or promoted prior to obtaining tenure under N.J.S.A. 18A:28-5 tenure can still be awarded under N.J.S.A. 18A:28-6 dispite the fact that it was not obtained under N.J.S.A. 18A:28-5. Sitek cites several Commissioner decisions, including VanWagner v. Roselle Bd. of Ed., 1973 SLD 488 and argues that the Commissioner has repeatedly determined that persons transferred must be eligible for tenure but need not have acquired it in order to receive it after two years of service following the transfer promotion.

I agree with petitioner as to his claim to have obtained tenure in the position of principal pursuant to N.J.S.A. 18A:28-6. The argument advanced by the respondent that tenure must be acquired under N.J.S.A. 18A:28-5 before the transfer provision of 18A:28-6 can apply was expressly rejected by the Commissioner in the VanWagner matter (Super. at 492-493). As noted by the Commissioner, N.J.S.A. 18A:28-6 provides that a teaching staff member who falls short of the required period of service is a position to which he or she is transferred or promoted may still receive tenure in their formal position "if he [she] then has tenure in the district" under the combined period of service in the former position and in position to which he/she was transferred. I concur with the Commissioner's analysis that tenure need not be acquired under N.J.S.A 18A:28-5 in order for tenure to be awarded under N.J.S.A. 18A:28-6. The intent of the statute is to protect the teaching staff members under tenure or eligible for tenure who consent to transfer or promotion by allowing them to acquire tenure in the new position within a shorter period than that required under N.J.S.A. 18A:28-5. In the event that the two year time period in the new position is not satisfied by actual service, the teaching staff member then is permitted to apply that time served to his/her former position and thus acquire tenure is the position from which the transfer or promotion was made. Although the VanWagner case is somewhat distinguishable in that it involved a teaching staff member who acquired both general tenure as a teacher and in the new position, the basic conclusion of that decision that tenure is available to untenured teaching staff memebers under N.J.S.A. 18A:28-6 is sound and should be applied to the facts of this case.

I disagree with the respondent's argument that the Supreme Court decision in the Spiewak matter, Supra, requires a different result. The Spiewak case, concerned the

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issue of whether the Tenure Act applied to remedial teachers under a Federal program and did not in any way consider a question of the application of N.J.S.A. 18A:28-6 as to transfers and its interrelationship with N.J.S.A. 18A:28-5. The transfer tenure provision applies to teachers who are under tenure pursuant to N.J.S.A. 18A:28-5 at the time of transfer or promotion and also to those "eligible to obtain tenure" under the Tenure Act. Respondent here argues that the phrase "under tenure" and "eligible to obtain tenure" which are separately expressed in the statute are intended to mean the same thing. This reading effectively eliminates the phase "eligible to obtain tenure" from the section and thereby does not give effect to the clear and unambigous terms employed by the legislature. In order to give effect to the phase "eligible to obtain tenure" it must be distinguished from the words "under tenure", which clearly refer to teaching staff members who have satisfied the requirements of N.J.S.A. 18A:28-5. In contrast, persons who are "eligible to obtain tenure" are those with the requisite certification and appointments to positions who, were they not transfered or promoted, would have acquired tenure in their former positions. By reading out the phase "eligible to obtain tenure" by interpreting it as implictable inapplicable untenured teaching staff members, the respondent Board denies protection to one class of employees that the tenure transfer section was intended to protect. I reject that reading of the satute and **CONCLUDE** that petitioner Alan Sitek acquired tenure to his position as principal in the Southern Regional School district after serving in that position for a period of two consecutive calendar years pursuant to N.J.S.A. 18A:28-6.

I further **CONCLUDE**, however, that petitioner did not acquire tenure as a vice-principal, by virtue of his subsequent service as a principal. Had he been terminated from his position as principal prior to serving two years under N.J.S.A 18A:28-6, he would have been able to include that period of employment as principal in determining his tenure rights to the former position and would have received tenure as a vice-principal if the combined years of service satisfied the requirements of N.J.S.A. 18A:28-5. The transfer tenure provision, N.J.S.A. 18A:28-6, would thus have protected petitioner in the event that he was terminated in his new position before the end of two years by allowing him to apply that time to acquire tenure in his former position.

On the basis of the above undisputed facts and conclusions of law it is **ORDERED** that petitioner Alan Sitek be reinstated to his position as principal of the Southern Regional High School and be awarded mitigated back pay.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Oct. 4, 1988
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

Oct. 4, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 7 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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ALAN R. SITEK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions and replies were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner excepts to that portion of the initial decision which concludes that he did not acquire tenure as a vice principal and avers he acquired tenure not only as principal but as vice principal as well. More specifically, he points to the following portion of N.J.S.A. 18A:28-6 as support that tenure was acquired in the vice principal position. It reads:

> ***provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member***.

Given the above, petitioner argues that the time he served as principal must be included in determining his tenure and seniority rights as vice principal.

The Board on the other hand supports the ALJ's determination that petitioner did not obtain tenure as vice principal but objects to the determination that he obtained tenure as principal since he never served the requisite three-year period of time in either the principal or vice principal position as dictated by N.J.S.A. 18A:28-5. More specifically, the Board argues that the ALJ ignored the New Jersey Supreme Court decision in Spiewak, supra, and that the Commissioner's decision in Van Wagner, supra, upon which the ALJ relied is in conflict with that decision because the requisite service prong of the Spiewak standard for tenure acquisition was not met.

The Board further argues that N.J.S.A. 18A:28-6 is not applicable in the instant matter because petitioner was neither tenured nor eligible to obtain tenure in any position within the meaning of that statute.

Upon review of the record in this matter, the Commissioner agrees with the ALJ's conclusion that petitioner acquired tenure as

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principal but he disagrees with the conclusion that tenure was not acquired in the vice principal position. Petitioner is correct in his argument that time served in a new position upon transfer or promotion shall be included in determining the tenure and seniority rights in his former position as vice principal.

As expressed by the Commissioner in Van Wagner, supra, in order to determine the tenure rights of an individual who has been promoted or transferred one must read N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6 in pari materia and that the prescriptive mandate of the second statute is triggered at the time when the precise requirements of N.J.S.A. 18A:28-5 have been met. More specifically, that decision states:

> ***If *** the teaching staff member has completed the service requirements of both statutes, he has achieved not only a general tenured status as a teaching staff member, but also a tenured status to his position. He has served an adequate probationary period. As the Court said in Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962):
>
> > ***The objectives [of the tenure statutes] are to protect competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone an adequate probationary period, against removal for unfounded, flimsy, or political reasons.***"
> > (at p. 71)
>
> This view is founded on a careful reading of the last paragraph of N.J.S.A. 18A:28-6 wherein it is clearly stated that the statute's provisions are applicable to nontenured teaching staff members as well as to those who have acquired a tenured status. Specifically, the Commissioner refers to that portion of the statute (N.J.S.A. 18A:28-6) which provides that, in the event employment in a "new position" is terminated:
>
> > ***before tenure is obtained therein, if he then has tenure in the district *** such teaching staff member shall be returned to his former position.*** (Emphasis supplied.)
>
> In the Commissioner's judgment, the "if" which the statute contains is a clear reference that the statute is applicable to nontenured as well as tenured teaching staff members who are "transferred" or "promoted" in the course of their

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> employment. Thus, the Board's argument, ante, is, in the Commissioner's view, a specious one. (Van Wagner, 1973 S.L.D. at 493)

In the instant matter, petitioner served two years as vice principal (July 1, 1983-June 30, 1985) and for nearly three years as principal from July 1, 1985-June 28, 1988. Tenure was acquired as vice principal under N.J.S.A. 18A:28-5 (three consecutive years of employment as a teaching staff member) on July 1, 1986 by virtue of his two years service as vice principal together with the time served as principal from July 1, 1985-July 1, 1986 as dictated by N.J.S.A. 18A:28-6.

Moreover, as well reasoned and correctly determined by the ALJ, once petitioner was voluntarily promoted to principal, tenure was acquired under N.J.S.A. 18A:28-6(b) upon the completion of two consecutive years service in that new position. Thus, no contradiction with Spiewak, supra, exists as argued by the Board because petitioner has in fact served the requisite period of time required for tenure acquisition not only under N.J.S.A. 18A:28-5 but under 18A:28-6(b) as well.

This determination is not only consistent with Van Wagner but with post-Spiewak decisions rendered on this very issue as well, namely Thomas Puryear v. Bd. of Ed. of the City of East Orange et al., decided December 24, 1987 and Frank Cerelli v. Bd. of Ed. of Hudson County Vocational and Technical Schools, decided January 26, 1988.

Consequently, the initial decision is affirmed in part and reversed in part as explained above. Accordingly, petitioner is ordered reinstated to the position of principal together with all back pay and emoluments less mitigation and with the recognition that he has acquired tenure in the vice principal position as well.

COMMISSIONER OF EDUCATION

November 15, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8004-87
AGENCY DKT. NO. 338-11/87

RAYMOND SHENEKJI,

Petitioner,

v.

BOARD OF EDUCATION OF THE PASSAIC COUNTY VOCATIONAL SCHOOLS,

Respondent.

Arnold S. Cohen, Esq., for petitioner
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Irving C. Evers, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: September 26, 1988 Decided: October 6, 1988

BEFORE: **WARD R. YOUNG**, ALJ:

Raymond Shenekji alleged that he is tenured as the Board secretary and school business administrator pursuant to N.J.S.A. 18A:17-2, N.J.S.A. 18A:17-14.3, and Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), and further alleged his termination of employment in those positions by the Board was in violation of N.J.S.A. 18A:6-10.

The Board denied that Shenekji is tenured as he did not serve full-time and asserts that its action terminating the employment of Shenekji was proper as it was clearly in the public interest to do so.

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The matter was transmitted to the Office of Administrative Law as a contested case on December 4, 1987, pursuant to N.J.S.A. 52:14F-1 et seq. It was assigned to the Honorable James A. Ospenson, A.L.J. and preheard by him on February 3, 1988, and set for plenary hearing on May 2, 3, 4, 5 and 6, 1988.

Petitioner filed a motion to disqualify counsel for the Board under R.P.C. 1.7 and 1.9 and pursuant to N.J.A.C. 1:1-3.8 and In re Onorevole, 103 N.J. 548, 556-7 (1986). The motion became moot when Board's counsel withdrew in favor of a substitution by a successor attorney. The hearing was adjourned and rescheduled for mid-July by Judge Ospenson. The matter was reassigned to the undersigned.

The substitution of attorney request was filed on July 11, 1988. The July hearing schedule was adjourned due to a conflict of the successor attorney with a tenure hearing and the matter was rescheduled for hearing September 26-30, 1988.

Counsel for petitioner filed a Motion for Summary Decision on September 12, 1988, and the record on the motion closed on September 26, 1988, with the filing of petitioner's reply letter memorandum to respondent's responsive brief. The hearing was adjourned by the undersigned, sua sponte, in the interest of economy and the likely determination of the motion.

UNCONTROVERTED FACTS

1. Shenekji was appointed counsel to the respondent Board on December 1, 1974. (He became a member of the New Jersey Bar in 1961.)

2. The State Board of Education approved the position of school business administrator on June 8, 1978.

3. Shenekji was appointed counsel/assistant Board secretary in 1979.

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4. Shenekji was appointed Board secretary/counsel on October 8, 1981.

5. Shenekji was appointed acting school business administrator on May 20, 1982.

6. Shenekji was relieved as Board counsel on November 1, 1982.

7. Shenekji was issued a certificate by the New Jersey State Board of Examiners in August 1983 to serve as a school business administrator.

8. Shenekji was appointed school business administrator on March 15, 1984, retroactive to August 29, 1983.

9. Shenekji was terminated from his employment as Board secretary and school business administrator on September 28, 1987, with 60 days compensation.

10. The April 10, 1987 evaluation of Shenekji by Superintendent Santaniello for the period April 30, 1986 to April 30, 1987, was satisfactory and stated that Shenekji "puts in a lot of time and is not a clock watcher."

11. Frank A. Sinatra, electrician and chief of maintenance, certified that he reported to Shenekji "on an almost daily basis . . ." and "[o]n many occasions I would see him more than once on a daily basis."

12. Guido Rocco, a Board member for over 10 years, certified that "[t]he Board, by his reappointment and annual raises, and, also, by his term of office, realized that we were giving Raymond F. Shenekji tenure, and the Board desired to give him tenure in the positions as Secretary/Business Administrator". Rocco also certified that Shenekji "worked full-time in the two positions he was appointed to."

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13. Frank Pace, a teacher employed by the Board for about 17 years, certified he has seen Shenekji "on an almost daily basis . . . in the mornings before classes begin" and " . . . on many occasions walking through the hallways during the day."

14. Robert Flick, a full-time employee in respondent's district, certified that he "reported to him [Shenekji] on an almost daily basis" and "saw him throughout the day on a daily basis."

15. William Murphy, a private investigator engaged by the Board on April 5, 1988, certified that Shenekji "was listed as an active practitioner [of law] with an office at 580 Valley Road, Wayne, from 1978 through 1987 [in the N.J. Lawyers Diary] and from 1985 through 1988 [in Martindale-Hubbell editions]. Murphy also certified that "at least four or five persons . . . told me that Shenekji was the actual owner of Perkins Pancake House" and that he "personally obseved Shenekji working the cash register at the Perkins Pancake House during the evening hours."

16. Mae Remer, assistant Board secretary, certified that Shenekji practiced law while he was employed by the Board, but did not state that such practice occurred during hours which conflicted with his school employment.

17. The Grand Jury for the County of Passaic conducted an investigation into the affairs of the Passaic County Technical and Vocational High School and issued a 20-page report, wherein the existence of serious problems were revealed and recommendations made for resolution, and also found "insufficient evidence upon which to return criminal charges against anyone connected with the Vo-Tech School."

18. The March 15, 1984 resolution appointing Shenekji as school business administrator, effective August 29, 1983, was seconded by Gustave Perna, then Passaic County Superintendent of Schools.

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19. The September 28, 1987 Board resolution, which terminated the employment of Shenekji, indicates that it resulted from the Board's consideration of the presentment issued by the Grand Jury of Passaic County and incorporated "The opinion that the said Raymond F. Shenekji does not occupy or have tenure of office in either capacity as Business Administrator or as Board Secretary."

ARGUMENTS OF COUNSEL

The Board argues that resolutions acted upon by the Board that resulted in a benefit to Shenekji lack validity as they were written by Shenekji and acted upon without "independent advice nor was counsel given or permitted," and are therefore void as a matter of law.

The Board also argues that Shenekji is not tenured as he has not met the statutory requirement of devoting full-time to his duties due to a conflicting law practice and interest in a business venture (Perkins Pancake House). The Board attacks the veracity of certifications provided by petitioner, in disputing whether Shenekji worked full-time, and avers it to be a material fact which shall deem summary judgment inappropriate pursuant to Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67 (1954).

The Board further avers that the position of board secretary/counsel to which Shenekji was appointed on October 8, 1981, was an unrecognized title and that no job description was submitted for evaluation of the required certification.

The Board finally asserts its termination of Shenekji was in the public's best interest and cites case law for its authority to rescind actions of a former Board and declare adopted resolutions null and void if it deems a former Board to have abused its discretionary authority. Cullum v. Bd. of Education of the Twp. of North Bergen, 27 N.J. Super. 243 (App. Div. 1953), aff'd, 15 N.J. 285 (1954). Thomas v. Bd. of Ed. of Morris Twp., 89 N.J. Super. 327 (App. Div. 1965) aff'd, 46 N.J. 581 (1966).

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Petitioner argues that the Board's responding papers do not challenge his claim that he is tenured as Board secretary and summary judgment is therefore appropriate as to that position.

Petitioner also argues that the Board's responding papers do not assert that Shenekji did not devote his full time to his position as secretary/school business administrator.

Concerning Shenekji's alleged conduct of inducement of the Board to act on his alleged self-interest resolution without the benefit of independent counsel, petitioner states that he was relieved of his responsibilities as counsel to the Board as of November 1, 1982, and was replaced by Edward O'Byrne, Esq.

Petitioner asserts that he worked full-time as board secretary/school business administrator and is tenured pursuant to N.J.S.A. 18A:17-2 and Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982), but does not deny that he participated in a small private practice of law which he avers "did not generate court appearances, except four to five minor court appearances that occurred during a six-year period, and which were charged to his vacation time." He finally argues that his school employment does not preclude him from participation in other activities after school hours that do not conflict with his school employment responsibilities.

DISCUSSION AND THE LAW

The gravamen of this matter is whether the Board abused its discretionary authority by its action in terminating Shenekji in violation of N.J.S.A. 18A:6-10, the Tenure Employees Hearing Law. It is undisputed that the Board did not certify charges pursuant to that statute because it believed Shenekji was not tenured. Shenekji's tenure status is questioned.

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N.J.S.A. 18A:17-2 states:

> a. Any secretary, . . . school business administrator . . . of a board of education of any school district who has or shall have devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years . . .
>
> . . . shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title." [Section 18A:6-9 et seq.]

N.J.S.A. 18A:6-10 states:

> No person shall be dismissed or reduced in compensation,
>
> > (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle . . ., after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person. . . .

The Board's argument that resolutions acted upon by the Board are to be deemed void as a matter of law because Shenekji prepared the resolution and because the Board acted on them without "independent advice nor was counsel given or permitted" must be rejected for several reasons. It is not at all unusual that most resolutions for Board consideration are written by the Board secretary. Shenekji had been relieved as counsel to the Board on November 1, 1982, and the critical resolution appointing him as school business administrator was effective on August 29, 1983, and adopted by the Board on March 15, 1984. Shenekji could not acquire tenure in that position prior to August 30, 1986. The Board has a responsibility and duty to seek legal advice on the implications of all resolutions under consideration. The failure of the Board to seek such advice should not be held to the detriment of Shenekji.

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Cullum and Thomas are clearly distinguishable from the instant matter. In Cullum, the appointment of the superintendent was invalidated because of the illegality of the special meeting at which the Board acted as the appointment resolution "was not only in pursuance of an illegal notice but exceeded the purpose stated in said notice." (Cullum, at 248). In Thomas, the termination of the superintendent by a successor Board was upheld because the action of the majority bloc of the previous Board, which dramatically reduced the probationary period for tenure from 3 years to 8 months, was not taken in good faith, which invalidated the second contract granted to the superintendent by the previous Board. I see none of the elements of either Cullum or Thomas in this matter.

The Board's argument that the October 8, 1981 appointment of Shenekji to the position of board secretary/counsel was to an unrecognized title and not submitted for evaluation of the certification required must also be rejected as being out of time, moot and not at issue herein.

The Board's argument that Shenekji has not met the statutory requirement for tenure because he allegedly devoted less than his full-time efforts to his responsibilities as Board secretary/school business administrator because of his law practice and business interest must be carefully considered. Shenekji was employed in this position from August 29, 1983 until his termination on September 28, 1987, a period of four years and one month. His law practice was not secretive. His business interest may have been, but was not disclosed until a report was filed by an investigator employed by the Board after its termination action. Neither activity is precluded by law and none of the Board's certifications indicated that Shenekji pursued them at a time which he was required to devote to his school employment responsibilities. The only evidence to support such an allegation is the representation of Shenekji's own counsel that there were "four to five minor court appearances that occurred during a six-year period, and which were charged to his vacation time." Superintendent Santaniello evaluated Shenekji and indicated for the period from April 30, 1986 to April 30, 1987, that he [Shenekji] "puts in a lot of time and is not a 'clock watcher'."

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The Board under which Shenekji served during his three-year probationary period as Board secretary/school business administrator certainly had ample time to assess the service of their employee and determine that he should not continue to serve beyond the statutory probation period. The Board under which Shenekji served after August 30, 1986, had recourse to seek remedies to any problem it had with Shenkji's service. It chose only to terminate him.

The pursuit of a law practice and/or a business interest by Shenekji while employed by the Board in a full-time position is not condoned here. It would appear to be reasonable to believe that conflicts of time in thought process alone would be difficult to avoid. However, I know of no preclusion to multiple employment or interests as a matter of law.

I **FIND** that Shenekji was employed by the Board as Board secretary/school business administrator which required a certificate; he possesses the required certificate; and he served the requisite time for the acquisition of tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). N.J.S.A. 18A:17-2.

The Grand Jury report clearly implicates Shenekji for certain improprieties, notwithstanding that it found "insufficient evidence upon which to return criminal charges against anyone connected with the Vo-Tech School." In the event the Board chooses to exercise its discretionary authority to act against Shenekji when it may perceive such action in the public's and school district's interest, it is indeed free to do so in compliance with law. N.J.S.A. 18A:6-10.

I **CONCLUDE** that Summary Judgment is **GRANTED** to petitioner. The Board is hereby **ORDERED** to reinstate Raymond Shenekji to his tenured position of Board secretary/school business administrator, and to compensate him for the salary denied him as the result of his termination, which shall be mitigated by income earned during the period he would have been engaged in fulfilling his responsibilities as Board secretary/school business administrator.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

6 October 1988
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

10/11/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 11 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g/e

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RAYMOND F. SHENEKJI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TECHNICAL AND VOCATIONAL EDUCATION, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner's reply and cross-exceptions were untimely received except for those reply exceptions addressing the later received exceptions filed by the Board. Thus, only those reply arguments made in response to the Board's exceptions dated October 25, 1988 which petitioner received on October 28, 1988 will be summarized below and made part of the Commissioner's consideration of this matter.

The crux of the Board's exceptions contend that the instant matter was subject to a material factual dispute and was therefore not amenable to resolution by summary decision. The Board claims it presented sufficient evidence at hearing to demonstrate that the issue of whether petitioner had served full-time pursuant to N.J.S.A. 18A:17-2 was subject to material dispute.

The Board avers that petitioner refused to comply with discovery requests for production of documents and schedules, including lawyer's diaries, tax returns, business interest in the Perkins Pancake House, etc. Moreover, the Board notes that a motion to strike petitioner's pleadings and, in the alternative, to compel petitioner to produce and to submit to depositions was filed with OAL after the filing of petitioner's Motion for Summary Judgment, on which the ALJ reserved ruling pending the outcome of the Motion for Summary Judgment.

The Board submits that the ALJ "rather than recognizing that a dispute existed and denying Petitioner's Motion for Summary Decision, made a finding of fact. This is not the proper application of the Summary Decision Rule. N.J.A.C. 1:1-12.5 Nor is it proper to make such a finding under an analogous Motion for Summary Judgment.***" (Board's Exceptions, at p. 3) It further claims that petitioner's failure to comply with discovery and to obey subpoenas to produce documents should have been viewed by the ALJ in light of N.J.A.C. 1:1-11.4 which states:

> A party who refuses to obey a subpoena may be subject to sanctions under N.J.A.C. 1:1-14.4 or

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> may suffer an inference that the documentary or physical evidence or testimony that the party fails to produce is unfavorable.

The Board contends it did not receive all the favorable inferences which it was due. Moreover, it contends the ALJ based the initial decision on findings of fact which were improperly considered under a Motion for Summary Judgment. It further avows that the evidence before the ALJ was compromised.

The Board requests that the initial decision not be adopted, that the matter be remanded to OAL, that petitioner be ordered to comply with the requested discovery and that a plenary hearing be held to determine this action.

The Board further argues that the position which petitioner held as Board Secretary/School Business Administrator was abolished on November 2, 1987. The Board avers that insofar as that position has not existed since November 2, 1987, reinstatement is not a feasible remedy, even if petitioner is found to have tenure. Further, assuming arguendo, that the Commissioner finds petitioner does have tenure, the Board claims the remedy relating to the award of back salary should reflect the abolishment of petitioner's former position on November 2, 1987. Thus, the Board contends, the period for which any back salary should be considered in damages should not exceed the November 2, 1987 termination date and, if awarded, should run from September 28, 1987 to November 2, 1987, reduced by mitigation. It affixes to its second set of exceptions a certification from the current Board Secretary as well as Board minutes and parts of the report from the Management Operational Audit submitted by KMG Main Hurdman dated December 4, 1986.

The Board reiterates its contention that petitioner did not serve full-time within the meaning of the statute and is not entitled to tenure status. It affirms its position that the initial decision improperly made a finding of fact in determining that petitioner was entitled to tenure and asks that a plenary hearing be held to resolve the matter.

Petitioner's reply exceptions aver that in connection with the argument developed in the Board's exceptions which claims the elimination of petitioner's job title,

> the underlying reason for the charade being perpetrated by the Board in this case is political patronage. The Board is attempting to circumvent the tenure laws in order to deprive Mr. Shenekji of this position, so that two employees being paid joint salaries well in excess of the salary paid to Mr. Shenekji can be employed by the Board. (Reply Exceptions, at p. 2)

Relative to the separation by the Board of the Board Secretary/School Business Administrator position, petitioner sets

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forth a chronology of events suggesting that the Board's actions in hiring replacements for him after its action dismissing him on September 28, 1987, following its earlier action by resolution whereby "the petitioner was not permitted to work for the Board [after] June 27, 1987" (Reply Exceptions, at p. 10), were politically motivated. Petitioner contends the Board is attempting to eliminate his back pay and tenure rights by naming two different individuals to his former position, Mae Remer to the position of Board Secretary on November 2, 1987 and Ronald E. Piliere to the position of Business Administrator on February 2, 1988. Petitioner avers he is tenured in either of these two positions and, thus, even if the Board correctly eliminated his former position, he still has tenure in the positions of School Business Administrator and Board Secretary. He claims he attained tenure in August 1986 as business administrator and attained tenure in the secretary position in October, 1984. Mr. Shenekji states, "By trying to circumvent [my] tenure rights, the Board has uncovered the blatant political nature of its actions." (Id., at p. 12) Petitioner claims additionally that the Board's exceptions show that he

> not only was not a part-time employee, but that he was more than a full-time employee. In this connection, Mr. Carl Santaniello, Superintendent of the Board since 1984, indicated in his recent evaluation of Mr. Shenekji that Mr. Shenekji is "not a clock watcher." (Id.)

Upon his careful and independent review of the record, the Commissioner adopts as his own the findings and conclusion of the Office of Administrative Law for the reasons expressed therein. He adds the following.

The Commissioner notes the Board's strenuous argument that this matter was not ripe for summary decision because of an alleged disputed material fact, that is, whether petitioner served in a full-time capacity, a predicate, it claims, to acquiring tenure in the position in question pursuant to N.J.S.A. 18A:17-2. The Commissioner finds that the ALJ's action in deciding the matter on the basis of summary decision was appropriate in that the Board brings to the record no conclusive evidence to establish that petitioner was other than a full-time employee. N.J.A.C. 1:1-12.5 states:

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set

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> forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.***

Although the Board argues vigorously in exceptions by way of a certification made by the current Board Secretary, Mae Remer, as well as by submitting the report of KMG Main Hurdman on its Management/Operational Audit dealing with whether petitioner's employment was full-time, such submissions may not enter the record for the first time after the close of the record by the ALJ. Consequently, the Commissioner does not include such exhibits in his consideration of the instant matter. Moreover, the argument posed in such exceptions is devoid of merit. The Commissioner notes for the record that a board may not abolish the position it created, that of Board Secretary/School Business Administrator, without the consent of the county superintendent, the Commissioner of Education and the State Board of Education. See N.J.A.C. 6:3-1.18(d) which states:

> All changes or modifications in the original plan concerning the position of school business administrator as submitted to the county superintendent of schools, the Commissioner of Education and the State Board of Education must be approved in the same manner as the original plan.

The record is lacking any evidence whatsoever that the Board sought the necessary approval before abolishing the position. Absent such compliance, such abolishment was ultra vires.

Further, the Commissioner is in accord with the ALJ that the Board's evidence suggesting that petitioner's services were less than full-time was inadequate to overcome the certifications presented by petitioner suggesting that his work for the Board was full-time. See Initial Decision, ante, wherein the ALJ stated:

> The only evidence to support such an allegation is the representation of Shenekji's own counsel that there were "four to five minor court appearances that occurred during a six-year period, and which were charged to his vacation time." Superintendent Santaniello evaluated Shenekji and indicated for the period from April 30, 1986 to April 30, 1987, that he [Shenekji] "puts in a lot of time and is not a 'clock watcher'."

In the absence of responding affidavits setting forth specific facts showing that there is a genuine issue of material fact which can only be determined in an evidentiary hearing, the Commissioner concurs with the ALJ that the matter is appropriately determined by the Motion for Summary Judgment and, further, he is in accord with the ALJ that summary judgment be granted petitioner on the merits.

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Initially, the Commissioner notes with disapproval the Board's appointing Mr. Shenekji to the position of Board Secretary/ School Business Administrator on March 15, 1984 retroactive to August 29, 1983, the date on or about when he was issued a certificate by the New Jersey State Board of Examiners. The record indicates that the Board first appointed petitioner as Acting School Business Administrator on May 20, 1982. However, the record is barren of any evidence that the Board received approval to appoint him in an acting capacity as required by N.J.A.C. 6:5-2.1(a) which requires the Board to make written application to the Commissioner of Education for permission to employ such person in an acting capacity, stating the reasons why such action is necessary. It would also appear from the record that the Board failed to comply with N.J.A.C. 6:3-1.1 (repealed effective August 1, 1988) in appointing petitioner in an acting administrative capacity for a period greater than one year without having sought permission of the Commissioner to recommend to the State Board of Education such extension.

The Board's action to appoint petitioner to the position of School Business Administrator on March 15, 1984 retroactive to August 29, 1983 was without authority. Even if the Board had sought and obtained permission for petitioner to serve in the role of Acting School Business Administrator before appointing him to that position in May 20, 1982, he could not have assumed the position of School Business Administrator until he obtained proper certification in August 1983. However, the Board's failure to appoint him to such position until some seven months later, retroactive to the date he did obtain appropriate certification, did not provide him with eligibility for tenure simply by virtue of his acquisition of the required certification. Inasmuch as the record clearly indicates that petitioner was not appointed to such position until March 15, 1984, it was at that time, not the date upon which he acquired his certificate, that tenure eligible service commenced. Although petitioner is tenured in his capacity as School Business Administrator, the Commissioner corrects the initial decision at page 8 to state that while he had been employed as School Business Administrator for a period of four years and one month, his service under tenure commenced on March 16, 1984, not August 29, 1983. The Commissioner so finds. The Commissioner further finds that any attempt on the Board's part to make such appointment retroactive must be deemed inappropriate.

Finally, the Commissioner notes that while the Board may have been dissatisfied with petitioner's performance, the method to which it resorted in eliminating petitioner from his tenured position is not sanctioned by the Commissioner. Neither was it appropriate for the Board to abolish the position of School Business Administrator without consent of the county superintendent, the Commissioner and the State Board, as explained above. Further, while the Commissioner's review of the Grand Jury presentment made a part of this record raises serious concerns relative to some of the practices which prevail in the district and for which the Grand Jury deemed petitioner responsible although not indictable, no basis exists for denying him his tenured position.

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With these further findings, the Commissioner accordingly adopts as his own the conclusions of the Office of Administrative Law as found in the initial decision and the motions raised by the parties as decided by the ALJ. He directs petitioner be reinstated to his position as Board Secretary/School Business Administrator in the Board's employ with all back pay and emoluments owing. In so finding, the Commissioner adds that the Board is not precluded from taking any such actions it may deem necessary pursuant to N.J.S.A. 18A:6-10 et seq. if it believes petitioner's service in such tenured position warrants dismissal or a reduction in salary.

COMMISSIONER OF EDUCATION

November 18, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4448-87
AGENCY DKT. NO. 131-5/87

WOODBINE EDUCATION ASSOCIATION, HAROLD PEEK, SUSAN PEEK, MIRIAM VIVES RIVERA, BERNARD SYPNIEWSKI AND MARYJANE SYPNIEWSKI,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE AND MUNICIPAL COUNCIL OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioners (Ruhlman, Butrym and Friedman, attorneys)
Richard T. Goodkin, Esq., for respondent Board of Education (Gorman & Goodkin, attorneys)
James A. Waldron, Esq., for respondent Borough Municipal Council (Rubins, Waldron and Barry, attorneys)

Record Closed: August 10, 1988 Decided: October 5, 1988

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BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE

By way of a Petition of Appeal and Amended Petition, parents, taxpayers and teaching staff members of the Woodbine Education Association (Association) allege, among other things, that the annual school budget for the 1987-88 school year as proposed by the Board of Education of the Borough of Woodbine (Board), which was defeated at the polls at the annual school election held on April 7, 1987 and as approved by the Borough Council of the Borough of Woodbine (Council), was insufficient to meet the Thorough and Efficient (T and E) clause of the New Jersey Constitution, the statutory provisions found at N.J.S.A. 18A:33-1 et seq. through N.J.S.A. 18A:35-1 et seq., the Public School Education Act of 1975 (N.J.S.A. 18A:7A-1, et seq.) or the regulations at N.J.A.C. 6:8-1.1 et seq. Petitioners seek, among other things, an order issued by the Commissioner of Education (Commissioner) voiding the adoption of the 1987-88 school budget and directing the Board to prepare a new budget for submission to the voters; directing both the Board and Council to provide sufficient course and program offerings in order that a T and E system of education is offered to all the Board's pupils; appointing a Monitor General to oversee the operation of the Board until such time as the Board offers a T and E system of education; and directing Council to stop interfering and intermeddling with the functions, activities and responsibilities of the Board. The Board and Council deny petitioners allegations asserting that their actions were proper and legal at all times.

The matter was transmitted from the Commissioner to the Office of Administrative Law (OAL) on June 25, 1987, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 12, 1987. Subsequently, on December 7, 1987, a second prehearing was conducted at which, among other things, a hearing was scheduled for March 10 and 11, 1988. Upon the request of counsel for the Borough Council, the matter was placed on the OAL's inactive list until May 6, 1988. The hearing was rescheduled for June 21 and 22, 1988. On June 21, 1988, the hearing record was opened at which time respondents moved for summary decision with respect to the Commissioners jurisdiction to hear and determine the instant matter

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and/or petitioners' standing to bring the herein action. The parties requested and were granted leave to submit briefs of law the last of which was received by the undersigned on August 10, 1988. Extensions for the execution of the initial decision were requested and granted.

STATEMENT OF FACTS

The Board operates an elementary school in grades kindergarten through eighth under a Type II classification pursuant to N.J.S.A. 18A:9-3. In accordance with N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-1.1 et seq., the New Jersey State Board of Education (State Board) adopted the recommendation of the Commissioner and approved the Woodbine School District for a five year period from September 5, 1986 to July 1, 1991. This approval was grounded upon the school district's monitoring report by the Cape May County Superintendent of Schools (County Superintendent) approving of the Board's educational plan.

On or about February 24, 1987, the Board introduced its current expense budget for the 1987-88 school year. On February 24, 1987, the 1987-88 current expense budget was approved by the County Superintendent. On March 4, 1987, the budget was published followed by a public hearing held on March 16, 1987. Subsequently, on March 24, 1987, the Board adopted its 1987-88 current expense budget and called for the public election as prescribed by N.J.S.A. 18A:22-32. At the annual school election held on April 7, 1987, the Board's budget was defeated at the polls by the electorate. Pursuant to N.J.S.A. 18A:22-37, the Board submitted its defeated budget to Borough Council which, after consultation with the Board, certified the budget as originally proposed and defeated at the polls to the Cape May Board of Taxation.

The Board's 1987-88 current expense budget, as originally proposed and subsequently certified, provided for the elimination of teaching positions in the areas of Industrial Arts, Home Economics, Music and Physical Education. The Board contends that it reduced the budget line item for certificated teaching staff members and eliminated the specialized instructional areas for reasons of economy pursuant to N.J.S.A. 18A:28-9.

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It is the actions of the Board and Council which form the basis of petitioner's allegations that the certified current expense budget for the 1987-88 school year is insufficient and inadequate to provide a T and E program of instruction to the pupils of the school district.

The respondents, jointly and individually, move for summary judgment in their favor and against petitioners for lack of standing to maintain the herein action. A summary of the parties respective arguments are set forth hereinbelow as follows:

ARGUMENTS OF THE PARTIES

COMMISSIONER'S JURISDICTION

At its Point I, the respondent Council observes that the Commissioner has broad authority to act in matters arising under the school laws, however, limited in certain circumstances as here. Council argues that the relief which petitioners seek is beyond the jurisdiction and authority of the Commissioner to grant, particularly with respect to the Borough Council and the municipality of Woodbine.

Council contends that the threshold jurisdictional issue is whether the petitioner's causes of action against it arises under the school laws. N.J.S.A. 18A:6-9; N.J.A.C. 6:5-1.2(a)(1). Where the controversy does not arise under the school laws, the dispute is outside of the Commissioner's jurisdiction even though it may pertain to school matters. *Board of Education of East Brunswick Twp. v. Twp. Council of East Brunswick Twp.* 48 N.J. 94 (1966). Council contends that it is necessary to distinguish between controversies which may happen to involve a school and those which actually "arise under the school laws." *South Orange Maplewood Education Ass'n. v. Board of Education of School Dist. of Sough Orange and Maplewood*, 146 N.J. Super. 457 (App. Div. 1977); *Board of Education of Vocational School in Camden Co. v. CAM/VOC Teachers Ass'n.* 183 N.J. Super. 206 (App. Div. 1982); *Newark Attendance Counselors Ass'n. v. Board of Education*, 2 N.J.A.R. 346 (1980).

Council refers to petitioners Second Count in its Petition of Appeal wherein it alleges, among other things, that Council involved itself in the 1987-88 school budget process prior to the preparation of the Board's initial budget proposal and

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7305-87

AGENCY DKT. NO. 290-9/87

M. K., W. K., and J.K.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY, NEW JERSEY DEPARTMENT OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

Respondents.

Herbert D. Hinkle, Esq., for petitioners

Steven B. Hoskins, Esq., for respondent Millburn Board of Education (McCarter and English, attorneys)

Elizabeth Zuckerman, Deputy Attorney General, for New Jersey Department of Education and New Jersey State Board of Education (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record closed: June 13, 1988 Decided: July 13, 1988

BEFORE **JAMES A. OSPENSON**, ALJ:

M.K., born September 1, 1954, a resident of the Township of Millburn, Essex County, from birth until 1984, presently a resident of the Borough of Spring Lake, Monmouth County, is learning disabled and during the period she was of school age was eligible for special education because of that disability. After a period of observation in Millburn Schools in 1962, the K. family placed her voluntarily and at their own expense in Gramon School until June 1976, when, at the age of 21 years, she satisfactorily completed a course of specialized instruction but never received a diploma. The family placed her in

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18A:33-1. In such a case, the specified remedy is only for the County Superintendent to withhold further disbursement of State aid funds until the facilities and curriculum are provided.

Council observes that petitioners also claim a failure to meet standards under N.J.A.C. 6:8; however, the remedy for that is also specified in N.J.A.C. 6:8-5. Moreover, the course of "corrective action" which is available thereby is also carefully defined therein, and does not include the extreme relief sought by petitioners in this case; moreover, this remedy is to be taken after a district is notified that it is not certified (following a periodic evaluation as provided in N.J.A.C. 6:8-4), which is not the case here.

Council contends there is a final reason why the Commissioner is entirely without authority to grant the particular relief claimed as against the Borough Council on the facts of this case. As stated in the Petition, after the voters rejected the Board's proposed budget, Borough Council nevertheless certified the full amount of the very same proposal. The Legislature has not given the Commissioner any authority to re-draw the budget or otherwise to act against the Borough Council in such a case. N.J.S.A. 18A:22-38 provides that the Commissioner can act against a governing body to determine the amount necessary for thorough and efficient education only where the governing body fails to certify an amount determined to be necessary for any item rejected at the school election. Thus, although the Commissioner's powers are broad in many other circumstances, the Legislature took care to specify that in this situation he can act only under the prescribed preconditions; and even then, his power to fix a budget on his own is constrained "within the limits originally proposed by the board of education". *Board of Education of Twp. of East Brunswick v. Twp. Council of Twp. of East Brunswick*, supra; *Paterson Board of Education v. Mayor & Council of Paterson*, 5 N.J.A.R. 133 (1982).

Thus, Council argues, the Commissioner has no authority to re-draft the budget in this case, since the Borough Council did certify the full amount of the Board's original proposal after the voters had rejected it. Accordingly, the First Count of the Petition must be dismissed for this reason also.

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Petitioners' counter to assert that the Commissioner has jurisdiction to grant the requested relief. Petitioners refer to the New Jersey Constitution, Article 8, Section IV, Paragraph 1 which states:

> The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools. . .

In fulfillment of this mandate, the Legislature has enacted statutory provisions in which the supervision and management of the public schools are entrusted to local boards of education. By other statutory provisions, however, the Legislature has deemed it appropriate and necessary to subject the local boards to the supervision of the State Board of Education, N.J.S.A. 18A:4-10, and to the supervision of the Commissioner, N.J.S.A. 18A:4-22. In this regard, the Commissioner has not only has the authority to determine whether the constitutional mandate of a thorough and efficient education is being discharged but also the duty to ensure that it is being discharged.

The Commissioner has "fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws." *Hinfey v. Matawan Regional Board of Education*, 77 N.J. 514, 525 (1978). The source of the Commissioner's jurisdictional authority is found in N.J.S.A. 18A:6-9 which states:

> The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws . . . .

On numerous occasions, the courts have "reaffirmed the great breadth of the Commissioner's powers." *Hinfey v. Matawan*, supra; *Jenkins v. Morris Township School District*, 58 N.J. 483 (1971); *Booker v. Plainfield Board of Education*, 45 N.J. 161 (1965); *Theodore v. Dover Board of Education*, 183 N.J. Super. 407 (App. Div. 1982). In the area of school budgets, the vast extent of the Commissioner's authority to review the actions of local boards and municipal governing bodies, which are responsible for appropriating funds, has become evident.

In *In re Masiello*, 25 N.J. 590 (1958), the Court recognized the authority of the Commissioner to review actions of the local board, and cautioned him against self-imposed limitations of his own authority. In *Board of Education of East Brunswick*

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Township v. Town Council of East Brunswick, 48 N.J. 94 (1966), the Court recognized the Commissioner's authority to evaluate competing claims between a board and a municipal governing body with respect to a school budget for a particular year. Specifically in that case, the board brought suit against the council because of its action in reducing the budget proposed by the board, alleging that the reduction would deprive the school system of needed materials and personnel and that the reduction had been made unreasonably in satisfaction of political commitments. Questions arose as to the authority of the Commissioner to review the matter between the two parties. The Court found the controversy to arise under the school laws and therefore subject to review by the Commissioner.[1] It stated inter alia, that the Legislature had, by its terms, brought the governing body into the educational budget-making process,[2] and that it was "not set adrift without guidance" but rather was to consult with the board to discharge the constitutional mandate. The Commissioner therefore had the authority to review the competing claims between the board and council, and, if necessary, direct appropriate corrective action by the council (or on his own) to fix the budget within the limits originally proposed by the board.[3] The authority of the Commissioner to direct corrective action was further recognized in *Elizabeth Board of Education v. Elizabeth City Council*, 55 N.J. 501 (1970). Therein, the Court affirmed the Commissioner's order directing the Council to take such steps as were necessary to make additional appropriations in the budget in order to ensure a thorough and efficient school system.

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1 See also *Town Council of Montclair v. Baxter*, 76 N.J.L. 68 (Sup. Ct. 1908).

2 The relevant statute was N.J.S.A. 18:7-82; and it provided that, where the voters had twice rejected the board's budget, the council was to certify the amount it deemed necessary to provide a thorough and efficient education. That provision is the predecessor to N.J.S.A. 18A:22-37.

3 *East Brunswick* is distinguishable from the instant matter; and the limitation is therefore inapplicable. This will be explained at length infra.

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In the earlier cited cases there may have been suggestion that the Commissioner's power to direct "budgetary changes" did not, in any situation, include the power to compel an increase in a local school budget above that fixed by the local board. In *Robinson v. Cahill*, 69 N.J. 449 (1976), however, that absolute limitation was rejected. The action, brought by an infant by his parent/guardian, concerned the Public School Education Act, N.J.S.A. 18A:7A-1 et seq., which was intended to meet all aspects of a thorough and efficient education. After reaffirming the responsibility (vis a vis the constitutional mandate of T and E) and authority of the Commissioner, Id. at p. 461, the Court stated, in relevant part, as follows:

> It has been suggested that the power, given both to the Commissioner and to the State Board of Education, to direct "budgetary changes" does not include the power to compel an increase in a local school budget above that fixed by the local authorities. We cannot accept this limitation; to do so would be to emasculate, perhaps fatally, what we believe to have been the legislative scheme. It would thwart the State Board's authority to compel a local district to meet the financial commitments necessary to satisfy the thorough and efficient standards. Cases such as *Board of Education, East Brunswick Township*, 48 N.J. 94 (1966) and *Board of Education of Elizabeth v. City Council of Elizabeth*, 501 (1970) are readily distinguishable. In those cases we examined, respectively, Type I and Type II school districts (N.J.S.A. 18A:9-2 and 3), and in each case suggested--although the point was not really argued in either suit--that the budget determination reached by the Commissioner should not exceed what had been first fixed by the local board of education. But these cases are in no event controlling precedents as to the matter now before the Court. They dealt with the problem of fixing and adopting the school budget for a particular year. In such cases the Commissioner acts somewhat as an arbitrator reviewing competing claims. Depending upon the type of district involved, he may be called upon to evaluate the conflicting claims of the local boards of education, the municipal governing body and the voters. Id. at 461.

Clearly then, as affirmed by the Court's decision in *Robinson v. Cahill*, the Commissioner has the authority, in challenges advanced by private interested

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parties, to compel an increase in a local school budget, above that fixed by the local authorities (board and/or council), where said increases is necessary to satisfy the mandate of thorough and efficient education. The Commissioner, in such case, has not only the authority to determine the extent of need, but also the authority to compel that it be satisfied.

Petitioners contend that the instant matter is similar to *Robinson v. Cahill*, and distinguishable from *East Brunswick* and *Elizabeth*. This is not a matter of competing claims between a board of education and a municipal governing body. On the contrary, the Woodbine Board and Municipal Council are, at least superficially, in agreement as to the budget. Rather this is a challenge by private individuals as to the sufficiency of the Woodbine budget to meet the thorough and efficient standards of the New Jersey Constitution. As such the Commissioner has the jurisdiction and authority to order budget increases beyond those fixed by the local authorities, which increases are necessary to satisfy T and E standards. Further, the Commissioner has the jurisdiction and authority to review the actual actions vis a vis the development of the school budget, of the local board, *In re Masiello*, supra. at 604, and the municipal governing body, *East Brunswick*, supra. at 105, which as the Court stated is "not a body set adrift without guidance" and control.

Petitioners observe that considerable attention has been directed to the authority of the Commissioner by virtue of legislative inactments. Of no less importance, however, is the Commissioner's duty to ensure compliance with the constitutional mandate of T and E. In *Masiello*, the Court stated that "his (Commissioner's) primary responsibility is to make certain that the terms and policies of the school laws are faithfully effectuated," Id. at 607. In *Robinson*, the Court stated that the Commissioner was made a "legislative agent" for the purpose of ensuring compliance with the constitutional mandate, Id. at 460, and that his responsibility is a "great and ongoing" one. Id. at 461. Clearly then, in this matter, the Commissioner's jurisdiction is not only one of right, but also of responsibility. He must ensure that the mandate of T and E is satisfied in the Woodbine district.

Finally, at pg. 6 of its brief, respondent Council suggests that the Commissioner is without authority to grant the relief requested as against the Council because the Legislature did not give him the authority to redraw the budget or otherwise to act against it under facts of this case: Specifically, respondent

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Council states that N.J.S.A. 18A:22-38 provides for a remedy where the budget dispute is between it and the local board and then only within the limits originally proposed by the board; and it thereby suggests that a remedy which is as in the fashion of an increase beyond the original school board budget, and which is as requested by petitioners, is unauthorized. Such a suggestion in this case (of "expressio unius est exclusio alterius") is without support in principle and in fact. For example, in *Maywood Education Association, Inc. v. Maywood Board of Education*, 131 N.J. Super. 551 (Cham. Div. 1974), the board argued that the absence of express authority to pay teacher employees for unused sick leave should be interpreted as an implied prohibition against such payments, in light of the existence of express Legislative sanction for such payment to certain other public employees. The Court held otherwise, stating that the Legislature's failure to make such provision could not be interpreted as evidencing a legislative intent to prohibit such payment to teachers, and that the more reasonable interpretation would be based upon the common sense of the situation, giving deference to the general public interest. Similarly, in *East Brunswick*, supra. at pg. 103 the municipal council advanced an argument that because N.J.S.A. 18:7-83 provided review by the Commissioner where no certification of a budget took place, review by the Commissioner was precluded where certification had taken place. The Court rejected the suggestion as "without substance." It stated:

> R.S. 18:7-83 simply provides that where the governing body makes no certification at all, the Commissioner shall make an original certification in its stead; it carries no implication that where the governing body does make a certification, its underlying determination that the constitutional and statutory standard has been satisfied is not subject to ... review within the traditional educational standards.

In view of *Maywood*, and also *East Brunswick*, it is clear that the doctrine of expressio unius est exclusio alterius is inapplicable here. The express provision of N.J.S.A. 18A:22-38 cannot reveal by implication a decision of the Legislature to preclude the remedy sought by petitioners against respondent Council. The significant public interest in a thorough and efficient education for all public school students in this State, as well as the significant authority entrusted to the

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Commissioner to review and control the budgetary actions of local board, and governing bodies, to ensure T and E, dictates the Commissioner's power in this situation. If there is any question as to this, the cases of *Robinson v. Cahill*, supra. and *Abbott v. Burke*, should dispel any doubts.

STANDING OF THE ASSOCIATION

At Point II, Council argues that the Association has no standing to bring this action against Council and the Board. In paragraph 2 of the First Count of the Petition, the Woodbine Education Association (hereinafter, "the Association") alleges merely that it "is the majority representative of all certified teachers employed by the respondent school district, and is bringing this action to assure that said teachers are able to provide a thorough and efficient education to the pupils in said district". For that statement to form the basis of a cause of action on the part of the Association, there would have to be (1) a duty imposed directly upon those teachers "to provide a thorough and efficient education", and (2) a duty imposed on the Association "to assure that said teachers are able" to carry out their duty. however, there is no such duty of the first type (which, necessarily, causes the second "duty" to fail); and even if there were, the Association has failed to support its conclusionary statement that it is empowered and entitled to represent the teachers in this regard. Petitioners have failed to document the source of any interest or authority of the Association which would entitle it to bring this action for the purpose stated in the Petition (or for any other purpose). Even if it is a "representative" of the teachers in some respect, there is no showing that it has the power and authority to represent anyone in this action.

Moreover, the causes of action stated in the Petition bear no relationship to the interests which the Association claims to represent in this action. In paragraph 12 of the First Count, the Association claims that "the students and taxpayers" of the district were deprived of certain interests to which "the students" are entitled. Similarly, in paragraph 9 of the Second Count, it is again alleged that only "the pupils and taxpayers"claim to have suffered any deprivation. The Association makes no claim that it represents any student or taxpayer as such. And the Association makes no claim that it or any of the teachers who it represents has suffered any deprivation, or otherwise has any interest in this "controversy" (except, of course, as any other citizen who cares, in general, about our schools).

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That sort of interest, in the sense of curiosity in the case, is not enough to entitle one to standing to bring an action such as this. Rather, "the question (of standing) is whether or not the party has a sufficient personal stake in the outcome as to justify the Court in entertaining his Petition". *Alameda Conservation Ass'n. v. California*, 437 F.2d 1087 (9 Cir., 1971) (emphasis added). As was said in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), the requirement that the party allege that he has sustained some "injury in fact" serves to distinguish a person with a direct stake in the outcome of a litigation from a person with a mere interest in the problem; the former has standing to sue, but the latter does not. Even well-recognized, well qualified, and long-standing champions of the interest in question in general do not have a sufficient stake to confer standing unless the organization has a direct stake in the controversy. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Council contends that under New Jersey law, to have standing it is required that the party have "a sufficient stake and real adverseness with respect to the subject matter of the litigation", and there must be a "substantial likelihood that some harm will fall upon it in the event of an unfavorable decision". *In re New Jersey Board of Public Utilities*, 200 N.J. Super. 544 (App. Div. 1985); *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm.*, 82 N.J. 57 (1980); *Crescent Park Tenants Assoc. v. Realty Equities Corp. of New York*, 58 N.J. 98 (1971); *Patrolmens Benevolent Assoc., Local 145 v. East Brunswick Twp.*, 180 N.J. Super. 68 (App. Div. 1981); *Matlack v. Board of Chosen Freeholders of Burlington Co.*, 191 N.J. Super. 236 (Law Div. 1983), aff'd., 194 N.J. Super. 359, certif. den., 99 N.J. 191. To have standing to represent putative third party rights, a party must show a personal stake in the outcome of a justiciable controversy in an adversarial context. *Frazier v. Liberty Mut. Ins. Co.*, 150 N.J. Super. 123 (Law Div. 1977).

Council asserts that in regard to cases presented to the Commissioner of Education such as this, N.J.A.C. 6:24-1.1 prescribes the criteria which must be met to have standing to bring such cases. An "interested person" is defined therein as one "who will be substantially, specifically and directly affected by the outcome" of the controversy. This is an even more stringent standard than formerly applied before the definition was amended in 1986, which the Association did not meet either.

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Council contends that no right, duty or other legal interest of the Association, nor of any of its member teachers, will be affected at all by a determination in this case, let alone "substantially, specifically and directly affected". By its very terms, this Petition only addresses the entitlements of the "students and taxpayers", whom the Association does not represent. No interest of the Association is at stake under any of the allegations of the Petition. Neither the Association nor any of its members as teachers are under any direct duty to provide (nor to "assure" the provisions of) a thorough and efficient education. That is the duty only of the State Legislature, as delegated to the Board of Education and the local school districts. N.J.S.A. 18A:7A-1, et seq.; N.J.S.A. 18A:33-1, et seq.; N.J.A.C. 6:8-2.1(b),-2.2(c). The Association might argue that its members might derive ancillary benefit if courses were to be added to the curriculum, but that has nothing to do with any of the complaints in the Petition. Or it might be claimed that some teachers have lost work because courses were cancelled, but again, that issue is entirely separate from the "thorough and efficient education" issues which supposedly are the basis of the Petition. Moreover, the Association would have no standing to assert any such individual claims of its members anyway, since the individual members are not parties. *New Jersey Education Ass'n. v. Essex County Education Services Comm.*, 5 N.J.A.R. 29 (1981). Normally, a party is only permitted to seek judicial vindication of his own rights. *State v. Norflett*, 67 N.J. 268 (1975).

Council argues that the Association simply has no justiciable claim or controversy against anyone in this case; no stake in the subject matter of whatever controversy there may be; no right, duty or other sufficient interest which "will be substantially, specifically and directly affected by the outcome" of any determination. In short, it has no standing to bring this action.

Petitioners argue that the courts and the Commissioner have consistently recognized that teacher "associations" qualify as "interested persons" in education matters, *Wyckoff Education Association v. Wyckoff Board of Education*, 1981 S.L.D. 1128, and thus having standing to bring actions on behalf of their membership as a whole, see *Freehold Regional High School Education Association, et al v. Board of Education of the Freehold Regional High School District*, 1978 S.L.D. 960, or on behalf of individual teacher members, *Neptune Twp. Education Association v. Neptune Twp. Board of Education*, 1988 S.L.D. (decided July 11, 1988); *Newark*

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Teachers Union, Local 481 v. Board of Education of Newark, 1978 S.L.D. 908; *Verona Education Association v. Verona Board of Education*, 1977 S.L.D. 1096, rev'd State Board of Ed., 1978 S.L.D. 1006. With respect to an association's interest, the Court in *Winston and South Plainfield Education Association v. 125 N.J. Super*. 131, 142 (App. Div. 1973), stated:

> The concern of an exclusive representative of public employees with respect to matters touching their employment is tangible and genuine; it is an interest sufficient to enable such an entity to participate as a party in proceedings before the Commissioner . . . .

In addition, standing has been predicated upon the possible impact that the decision in the respective matter may have on the employment of other association members. *Wyckoff*, supra. at 1132.

In the instant matter, the elimination of the curriculum in Industrial Arts, Music and Home Economics (and the elimination of physical education course offerings as taught by Physical Education Teachers), has had two-fold effect: it has caused the termination of teachers certified in those areas, and it has imposed the unrealistic burden upon the regular academic teachers to attempt to incorporate physical education offering materials into their regular schedules. These matters intimately affect the employment of, and delegation of duties to, teachers who are and were in the Woodbine district. As such, they are matters within the scope of the Association's status as a representation of employees; and it therefore has standing. *Wyckoff*, supra.

Petitioners assert that *Wyckoff*, and the other decisions set forth above, that the Association's interest is that of its membership or individual members, and that it can have standing "on their behalf" where the individual members themselves are not parties. *Wyckoff*, supra.; *Neptune*, *supra*.; *Wyckoff Education Association v. Wyckoff Board of Education*, 1980 S.L.D. 228. Furthermore, New Jersey case law has demonstrated a liberal approach on the issue of standing when that matter involved is one of great public interest. In this regard, this Court's attention is directed to the case of *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township*, 92 N.J. 158 (1983). There the Court recognized that "procedural frustrations" must not be allowed to prevent merits determinations of issues of

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great public concern, such as exclusionary zoning. No less can be expected here. Clearly, thorough and efficient education is a matter of importance equal to, or perhaps even greater than, zoning; and overburdensome terms of standing should not be utilized to frustrate or defeat final determination of the relevant issues on the merits.

Finally, two (2) statements made by respondent Council in Point II of its brief, i.e. ". . . there is no showing that it (Association) has the power and authority to represent teachers (in this matter)", and "neither the Association nor any of its members as teachers are under any direct duty to provide (nor to "assure" the provisions of) a thorough and efficient education", require brief comment. To begin with, the Woodbine Education Association was selected as the exclusive employment representation of teachers employed by the Woodbine Board of Education pursuant to N.J.S.A. 34:13A-1 et seq. To suggest at this time that the Association has no authority to represent teachers in the instant matter is preposterous. At the depositions taken on May 18, 1988, Sharon Popper, President of the local Association, testified, before counsel for the Council and the Board, that she represented the twenty-four (24) Woodbine teachers as a group in this matter.

As to the Association's members' duty to "assure" the provisions of the constitutional mandate of T and E, attention is directed to N.J.S.A. 18A:6.7. The latter statutory provision requires every teacher to take and subscribe to the oath of allegiance and office prescribed in N.J.S.A. 41:1. That oath states, in relevant part,

> I . . . do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New Jersey, . . .

Lest anyone forget, Article 8, Section IV, Paragraph 1 of the New Jersey Constitution incorporates the mandate of T and E.

STANDING OF THOSE OTHER THAN THE ASSOCIATION

Council argues that the remaining petitioners, that is all petitioners with the exception of the Woodbine Education Association, are parents of students allegedly enrolled in the district school. The Petition alleges that they have brought this

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action as such and as "taxpayers". The only persons who have the direct stake in this supposed controversy -- the students -- are not parties, even by representation. Their parents sued as parents and taxpayers, not as representatives of their student children. But, as such, the petitioners are not being deprived of a thorough and efficient education -- it is only claimed that their children are. Even as "residents" or "taxpayers" of the district, they cannot be "substantially, specifically and directly affected by the outcome" of this matter (except, as taxpayers, their tax bill might go up if they are successful, whereas the majority of all taxpayers in the district rejected even the lower budget), and, thus, they have no standing as petitioners in this case.

None of the present petitioners are proper parties in this case; and none of the necessary and indispensable parties are petitioners. This case must, therefore, be dismissed in its entirety. N.J.A.C. 6:24-1.9. At Point IV of its brief, Council contends that this action must be dismissed as to certain named individual petitioners because they do not even have children enrolled in the Board's school district.

Petitioners argue that "interested persons", for the purpose of standing, are those who will be "substantially, specifically and directly affected by the outcome" of the controversy. N.J.A.C. 6:24-11. By virtue of this definition, petitioners Rivera, Peek and Sypniewski have standing.

Petitioner Rivera has a 12 year old who will be in the 8th grade at the Woodbine Elementary School for the 1988-89 school year. Petitioner Rivera made it clear from the outset of her testimony, that she was appearing in the instant matter on behalf of her son, who will be substantially and directly affected by any T and E determination regarding the Woodbine district.

Respondents have advanced arguments concerning the technical sufficiency of the pleadings; specifically, they have alleged that petitioners, including Ms. Rivera, have sued "as parents and taxpayers -- not as representatives of their student children." However this is an inaccurate representation. Petitioner Rivera testified that she brought the action to protect her son's interest. Furthermore, the Petition should be read in this light; and it should not be interpreted by respondents to militate against this understanding. Petitioner is entitled to a liberal interpretation on the contents of the petition, and to the benefits of all its

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allegations and the most favorable inferences which may be reasonably drawn from the. *Rappaport v. Nichols*, 31 N.J. 188 (1960). This attitude is consistent with N.J.A.C. 1:1-6.2 (amendment of pleadings) which criticizes "over-technical pleading requirements." Given the above, the Petition must be read for its true purpose, and to the best interest of Woodbine students.

With regard to petitioners Peek and Sypniewski, it is respectfully submitted that, although their children are no longer attending school in the Woodbine district, they still have an interest in the outcome of this matter. This matter involves the constitutional mandate of T and E in the Woodbine district -- it is an issue of great public concern to all residents. As such, the interest which these petitioners must have is not as technically satisfying as that normally required; and it must not be undermined so as to frustrate or defeat final determination of the issues on the merits.

THE ELIMINATION OF CERTAIN CURRICULAR PROGRAMS AND OFFERINGS BY THE BOARD

The Board asserts that the elimination of specialized teaching staff members in the areas of industrial arts, home economics, music and physical education is within its discretionary authority and is not subject to interpretation and review and, therefore, is a nonjusticible matter before the Commissioner. In meeting its responsibility to establish the course curriculum for the school district, pursuant to N.J.S.A. 18A:11-1 and N.J.A.C. 6:83.5, it adopted the curriculum for the 1987-88 school year on August 17, 1987. (See attached curriculum guides for Music, Industrial Arts, Home Economics, Physical Education). The Board contends that the curriculum as adopted is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the Board's decision was arbitrary or unreasonable. *Thomas v. Board of Education of Morris Township*, 89 N.J. Super, 327, 332 (App. Div. 1965). The approved curriculum remained intact throughout the 1987-88 school year.

The Board asserts that its action to eliminate the certificated teaching staff member specialists, as alleged by petitioners, was within its statutory authority to order a reduction in force. The controlling statute, N.J.S.A. 18A:28-9 provides that:

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> "Nothing in this or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

Also, boards of education have inherent statutory authority to reassign and transfer anywhere within the scope of their certification. *Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed.* ,78 N.J. 144 (1978). A presumption of regularity attaches to a board's teaching assignments.

The Board argues that the school law vests the management of the public schools in each district in the local Board of Education and unless they violate the law or act in bad faith in the exercise of their discretionary duties they are not subject to interpretation or review. See *Kenny v. Bd. of Ed. of Montclair*, 1938 S.L.D. 647, affirmed State Board of Education 649, 653. The elimination of certain specialist in the areas of Industrial Arts, Home Economics, Music and Physical Education and the subsequent transfer and reassignment of these duties to individual classroom teacher is a discretionary function of the "Board" and is not subject to review by the Commissioner.

The Board contends that the issue really becomes whether it violated any of the provisions of N.J.S.A. 18A:7A-1, et seq. (the Public School Education Act of 1975) by abolishing the positions of Industrial Arts teacher, Home Economics teacher, Music teacher and Physical Education teacher. This very issue has been decided by the Commissioner of Education in the matter of *Belvidere Education Association, et al v. Board of Education of the Township of Belvidere, County of Warren*, OAL DKT. NO. EDU 3708-79, Agency Dkt. No. 279-7/79A.

In *Belvidere*, the Board of Education eliminated the position of certified art teacher and transferred the responsibility to the properly certified elementary teachers. The Commissioner found that all elementary teachers were authorized to teach " ...art, music, health, home economics and industrial arts, although in this

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latter group they are not permitted to devote more than one-half time to such subject matter. *New Jersey Regulations and Standards of Certification*, 1976."

The petitioners submitted an expert's report by Thomas B. Corcoran which stated in part "...the questions is whether such opportunities can be provided and the state goals met, by asking regular classroom teachers to cover all these subjects, in addition to the core subjects... It is further my opinion that the elimination of specialists to teach these subjects (Industrial Arts, Home Economics, Music, and Physical Education) by the Woodbine Board of Education place an unmanageable burden of teaching the entire curriculum on the classroom teacher."

The Commissioner in the *Belvidere* case, dealt with this very issue "...If petitioners' argument prevailed against such so called Jacks/Jills-of-all-trades and was followed to its ultimate conclusion, such teachers would have to be entirely eliminated from the classroom to allow only the specialized area experts to present their narrow field of expertise. THE COMMISSIONER FINDS NO MERIT IN SUCH ARGUMENT."

Accordingly, for the reasons stated above, respondent, Board of Education of the Borough of Woodbine respectfully requests that the Court grant partial Summary Judgment in favor of the respondent against the petitioners.

Petitioners refer, in part, to the Board's brief wherein the Board alleged that: a) the "curriculum dealing with the areas of industrial arts, home economics, music and physical education" "remained intact throughout the 1987/1988 school year" [4] and b) its act of eliminating certified specialists and transferring their responsibilities to the regular elementary teachers, was proper. The first allegation is inaccurate; the latter is without foundation and in dispute.

Turning first to the allegation that the curriculum was "intact" for the 1987/88 school year, the testimony, offered by the Board's own witnesses during

[4] Petitioners note that respondent, in its brief, has made this statement without the support of affidavit which is essential to a summary judgment motion.

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depositions, contradicts same. The relevant portions of the testimonies of two (2) board members were as follows:

CHRISTINA SINGLETON

Q. Do you recall what, if anything, was considered -- strike that.
It has been testified to that the programs or the curriculums of home economics, industrial arts and music were eliminated from the curriculum for the '87/'88 school year and that would not be provided for; is that correct?

A. Yes.

Q. Do you have any understanding as to why those items were being eliminated?

A. It was my understanding and having been there and in direct contact with it that because these were the part time or proverbial subjects and that there was a dire need that the basic subjects of reading, writing and arithmetic be presented to the students, that the four subjects mentioned be the ones that would be more likely to be eliminated. (T7:15 to T8:8).

GREGORY HUDGINS

Q. Are you familiar with the fact that home economics, industrial arts and music were eliminated from the program?

A. Yes.

Q. And that physical education was being taught or is being taught this year by regular classroom teachers?

A. Yes.

Petitioners assert then, the testimony under oath of the board's members, establishes that the programs did not remain "intact." Such being the case, the Board's second allegation that the responsibilities of the special teachers were transferred to the regular teachers is without foundation. If the programs were eliminated, what responsibilities could be transferred? Here, all inferences of doubt

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are to be drawn against respondent Board. Rothman v. Silber, 83 N.J. Super. 192 (Law Div. 1964).

Assuming arguendo that some part of the general responsibilities (not the curriculum) were attempted to be transferred to the regular teachers,[5] there is still factual dispute as to whether these responsibilities were, or even could in fact, be transferred. Respondent speaks of "the transfer of responsibilities" in no uncertain terms; however, the deposition of Association President, Sharon Popper, clearly establishes that such was just not the case. She states that the duties were never formally transferred; and that in January/February 1988 after the institution of this lawsuit, an informal letter was distributed explaining to teachers what they could do. (see Exhibit A).

Given the elimination of the specialized teachers and the specialized curriculum, and the factually questionable transfer of the duties of said teachers, petitioners respectfully submit that this court cannot reach any determination at this time as to whether the foundation for T and E was satisfied in Woodbine. Granted, a board of education has the managerial prerogative to eliminate and reassign teachers, but not in disregard of the constitutional mandate.

Finally, petitioners respectfully assert that, since the *Belvidere* case cited by respondent Board was not attached to its brief, and appears to be unreported, they cannot review and reply to same and would not be held to said decision until they have been provided with a copy of same, and have had the opportunity to review and determine its applicability, if any.

DISCUSSION

I. THE COMMISSIONER'S JURISDICTION

5 Petitioner notes that in the area of physical education, the teachers, at the direction of the board, did "assume" some of the P/E instructional duties. Petitioners in making said notation, however, do not waive their right to contest the appropriateness of this transfer of duties.

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The Commissioner is the chief state school officer, having supervision over all public schools in the state. The Commissioner is vested with statutory and regulatory authority, which is summarized at N.J.A.C. 6:5-1.2 under powers and duties as follows:

> (a) The powers and duties of the commissioner are as follows:
>
> 1. The commissioner is empowered to decide legal controversies and disputes arising under school laws or State board regulations and his decisions have the force of law;
>
> 2. To apportion State aid to local school districts;
>
> 3. To issue teacher certificates;
>
> 4. To approve vocational schools;
>
> 5. To issue rules and regulations for the classification of retarded and handicapped children;
>
> 6. To conduct Statewide tests;
>
> 7. To prescribe minimum courses of study for elementary and high schools;
>
> 8. To withhold State aid from local school districts which fail to comply with school law or State board regulations; and
>
> 9. To promulgate such other rules and regulations as may be authorized by statute or the State board.

There is little doubt or question that the Commissioner has broad power and authority over local boards of education. However, where, as here, it is alleged that the local governing body influenced or interfered with actions of a local board of education, the Commissioner's jurisdiction extends only to that local board of education and not to the governing body. In the matter of the *North Bergen Federation of Teachers, Local 1060, et al v. Bd. of Ed. of the Twp. of North Bergen, Hudson County*, 1978 S.L.D. 218, the Commission found and determined that the North Bergen Township Board of Education had acquiesced to the political influence and intermeddling of its employment practices by the Mayor of North Bergen. The Commissioner observed and stated, at 245, the following:

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> ....Such involvement was not envisioned by the Legislature when it provided for autonomous boards of education to implement the constitutional requirement that a thorough and efficient system of free public schools be established and maintained. Nor has it since been sanctioned by statutory enactment. Rather, local education boards are established by law as corporate entities separate and apart from municipal governing bodies. *Merrey v. Board of Education of the City of Paterson*, 100 N.J.L. 273 (Sup. Ct. 1924) Whatever the classification of a school district, it is required by law to be governed by a board of education whose actions are distinct from those of municipal governing bodies, except as the law allows. Intrusion into the affairs of a board of education, except as the law provides by a municipal official, is not only illegal but also requires that a board desist from acquiescing thereto. *Botkin v. Westwood*, 52 N.J. Super. 416 (App. Div. 1958)

Notwithstanding that the Commissioner cited certain statutory powers granted to boards of education into which municipal governing bodies may not intrude, the Commissioner could neither sanction nor penalize the North Bergen Mayor for his illegal conduct. Rather, the Commissioner was compelled to forward his decision and the complete record of the controversy to the Attorney General of New Jersey and the Hudson County Prosecutor, either one of which possessed the authority, capacity, power and right to act with respect to the alleged illegal activity. 1978 S.L.D. at 249.

Similarly, the Commissioner is without authority, statutory or otherwise, to impose sanctions or penalties upon the Woodbine Municipal Council. *North Bergen Federation of Teachers.* Accordingly, I **FIND** and **CONCLUDE** that the Commissioner lacks jurisdiction to consider or redress petitioners claims of alleged ultra vires acts committed by the Woodbine Municipal Council. It is, therefore, **ORDERED** that partial summary decision be granted and entered on behalf of respondent Woodbine Municipal Council and that it be and is hereby **DISMISSED** as a party litigant.

II. STANDING

Petitioners allege, among other things, that the Board's annual current expense budget for the 1987-88 school year was insufficient to provide for a

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thorough and efficient system of education in the Board's school district. Petitioners contend that by virtue of their various positions in the school-community; i.e., Association and/or parent-taxpayer, they have standing to maintain the herein action against respondents. Petitioners assert that they are "interested person(s)" as defined by N.J.S.A. 6:24-1.1.

The question now to be resolved is whether, under the statutory provisions, petitioners have the requisite standing to request the Commissioner to override the Board's discretion in setting the amounts for its current expense budget and the Council's adoption of same after the budget had been defeated at the polls by the electorate?

The Legislature has devised a comprehensive system for the preparation of annual school budgets in such detail and so itemized as to be readily understandable N.J.S.A. 18A:22-7, N.J.S.A. 18A:22-8. It mandates that the public be fully informed, by way of a public hearing where the contents of the budget and the amounts of money necessary to be appropriated for the use of the public schools for the ensuing school year are set forth. N.J.S.A. 18A:22-10, N.J.S.A. 18A:22-12, N.J.S.A. 18A:22-13. At or after the public hearing on the budget where taxpayers and other interested persons may present objections and be heard with respect to the budget, the Board determines the amount of money to be voted on by the legal voters of the school district at its annual school election. N.J.S.A. 18A:22-32, N.J.S.A. 18A:22-33. In the event the majority of the legal voters voting upon the Board's budget approve the proposition, the secretary of the Board certifies to the county board of taxation the amounts of money necessary and the taxes to be assessed, levied and collected in the municipality for school purposes. N.J.S.A. 18A:22-33. However, if the voters reject any of the items of the Board's budget submitted at the annual school election, the governing body of the municipality, after consultation with the Board, shall determine and certify the amount to be appropriated for each item in the budget to provide a thorough and efficient system of schools in the district. In the event the Board determines that the amounts appropriated and certified to the county board of taxation is insufficient to provide a thorough and efficient system of schools in the district, the Board shall, by way of notice to the governing body, set forth its intention to appeal the certified amounts to the Commissioner. N.J.S.A. 18A:22-37.

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Thus, the Legislature provides for a system of public information as to the detailed contents of the proposed budget with the opportunity to be heard and set forth any objections with respect to budget and the amounts necessary to be appropriated for the ensuing school year. N.J.S.A. 18A:22-13. It also provides, subsequent to the public hearing, for an election to be held within the boundaries of the school district for the electorate to either approve or disapprove of the Board's proposed budget. N.J.S.A. 18A:22-33. Both of these statutory procedures were comported with by the herein Board. As the undisputed facts demonstrate, the electorate rejected the Board's budget proposal and defeated it at the polls. The public, therefore, had two occasions on which it expressed its opinion as to the efficacy of the Board's proposition.

The Legislative scheme provides the Board with the opportunity to appeal to the Commissioner those amounts reduced from its original budget by the governing body following the voters rejection of the Board's proposal. N.J.S.A. 18A:22-37. Here, Council maintained and certified to the Cape May County Board of Taxation the amounts originally proposed by the Board but rejected by the voters. Consequently, the Board had no grounds to affect an appeal before the Commissioner. Nor does the statute provide for the Association, taxpayers and/or parents to appeal a school budget proposal to the Commissioner whether or not it was partially or fully certified by the governing body. As the Commissioner said in *Charles C. Colozzi v. Bd. of Ed. of the Boro of Merchantville, Camden County*, 1977 S.L.D. 288, 292:

> ...Nor does any provision exist in statutory or case law whereby any individual or body other than a board of education may appeal to the Commissioner a defeated budget as acted upon by a municipal governing body pursuant to N.J.S.A. 18A:22-37. (citation omitted).

The Legislature provides the public at least two opportunities to be heard with respect to the Board's budget proposal; i.e., a public hearing and at the polls. The Legislature, in its wisdom, thereafter limited the appeal process to the local board of education to the exclusion of all others. In the event every disgruntled taxpayer or special interest advocate were permitted to appeal a board's budget, whether it had been approved or defeated by the voters utter chaos would result. A local board of education could, presumably, be constantly embroiled in

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administrative and/or judicial proceedings without knowing whether or not it had a budget in place for the operation of its schools. Thus, the statutory provision of the process pursuant to N.J.S.A. 18A:22-37 serves the salutary purpose of limiting the scope of the litigation and only by the initiation of the local board of education.

The uncontested facts also demonstrates that the County Superintendent of Schools, the Commissioner's representative for T and E purposes pursuant to N.J.A.C. 6:8, approved the Board's budget proposal prior to its formal adoption by the Board and the Board's submission to the electorate. The County Superintendent had every opportunity to review the contents of the Board's budget and to withhold his approval in the event the budget failed to provide for a T and E system of education in the school district. He did not do so but, rather, approved the submission.

As was stated by the Court in *Quinlan v. Bd. of Ed. of North Bergen*, 73 N.J. Super. 40 (App. Div. 1972):

> ...When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable.....(Id. at 46-47).

I **FIND** and **CONCLUDE** that based upon the foregoing, petitioners lack standing to maintain the herein action before the Commissioner of Education. Accordingly, it is therefore **ORDERED** that partial summary decision be and is hereby entered on behalf of the Board and that the Petition of Appeal is hereby **DISMISSED**.

Having found and determined that petitioners lack the requisite standing to bring the herein action, *Colozzi*, supra, there is no need to address the other issues as alleged by the Petition of Appeal.

Accordingly, the Petition of Appeal is **DISMISSED** in its entirety.

This recommended decision may be adopted, modified or rejected by the

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COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

5 October 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10/11/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 11 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

dho

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WOODBINE EDUCATION ASSOCIATION ET AL.,	:	
	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE AND MUNICIPAL COUNCIL OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
	:	
RESPONDENTS.	:	

The record of this matter including the initial decision rendered by the Office of Administrative Law has been reviewed by the Commissioner of Education.

It is observed that petitioners' exceptions to the initial decision were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In their exceptions petitioners rely on the arguments advanced before the ALJ in their brief in opposition to respondents' Motions for summary Judgment which have been addressed in details in the initial decision and incorporated by reference herein.

In excepting to the findings and conclusion reached in the initial decision, petitioners take issue with the following:

> The first conclusion reached by the Administrative Law Judge in the Initial Decision is that "the Commissioner is without authority, statutory or otherwise, to impose sanctions or penalties upon the Woodbine Municipal Council. North Bergen Federation of Teachers." In this regard, the ALJ cited the matter of North Bergen Federation of Teachers, Local 1060, et al vs. Bd. of Ed. of the Twp. of North Bergen, Hudson County, 1978 S.L.D. 218. The reliance by the ALJ upon Bergen is unsupported, not only by virtue of the fact the facts of North Bergen are distinguishable from those of the instant matter, but also because later case law offers support for the Commissioner's jurisdiction over the governing bodies of municipalities in school law matters. In North Bergen, the matter before the Commissioner was one of criminal or quasi-criminal activity, i.e. intermeddling in the educational affairs of the school district, by the Mayor of North Bergen. Clearly, the illegal activity was

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> not one over which the Commissioner had jurisdiction, nor was it one for which he could impose a penalty or establish a remedy. In the instant matter however, Petitioners seek, among other things, a directive that the Board and Council take such action as to provide sufficient course and program offerings in order to insure that T&E system of education is offered to all district pupils. The relief requested is a matter of school law which is within the authority and control of the Commissioner. In this regard, Petitioners adopt herein, by reference, the arguments made in their Original Brief of August 9, 1988, attached hereto. Specifically, Petitioner emphasizes the case of Robinson v. Cahill and In re Masiello wherein the Commissioner's authority was established, and the case of East Brunswick Township wherein the Court stated that a municipal governing body is "not set adrift without guidance" and control.
>
> As to the matter of standing, it appears that the Administrative Law Judge is not viewing that term in the sense of persons who will be substantially, specifically and directly affected by the outcome of a controversy, but rather in the sense of authority to review the matter within the boundaries set forth in NJSA 18A:22-1 et set. In this regard, Petitioner incorporates the arguments set forth at pages 7, 8 and 9 of its Brief concerning the doctrine of "expressio unius est exclusio alterius." Further, Petitioners note that the relevant statutes are intended to support the establishment of thorough and efficient education in the schools of this state. If the statute is interpreted as narrowly, as the Administrative Law Judge suggests, the purpose of the statute will not be supported, but rather restricted. (Petitioners' Exceptions, at pp. 1-2)

Upon review of petitioners' exceptions to the initial decision, the Commissioner is not persuaded that a reversal of the initial decision is warranted essentially for those reasons set forth by the ALJ. The Commissioner hereby adopts as his own the findings and conclusion reached by the ALJ in the initial decision with the following modifications.

Given the fact that the previous county superintendent had approved the Board's 1987-88 school budget, which included program reductions in teaching positions in the areas of industrial arts, home economics and physical education, the Commissioner hereby directs the Cape May County Superintendent of Schools to further review the existing programs that are currently in operation in the Woodbine School District in order to reassess what impact, if any, the reductions of such programs are having upon the Board's ability

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to assure a thorough and efficient system of education for its pupils in accordance with the provisions of N.J.S.A. 18A:7A-5.

The assessment is to be completed before approval is given to the Board's 1989-90 school budget proposal which is to be submitted for voter approval on April 4, 1989. In the event that it is determined by the county superintendent that the Board's prior reductions in educational programs for reasons of economy negatively impact upon its ability to ensure its pupils a thorough and efficient system of education as envisioned by N.J.S.A. 18A:7A-5, the county superintendent will thereby direct that the funding for such programs be incorporated into the Board's 1989-90 school year budget request prior to its approval and submission to the voters. IT IS SO ORDERED.

Accordingly, the initial decision is hereby affirmed with the above modifications and the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 23, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7940-87
AGENCY DKT. NO. 331-11/87

J.B. AND P.B., AS PARENTS AND NATURAL GUARDIANS OF B.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, BOARD OF EDUCATION OF THE BOROUGH OF BELMAR AND THE BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN, MONMOUTH COUNTY,
Respondents.

P.B., petitioner, pro se
J. Peter Sokol, Esq., for respondent Asbury Park Board (McOmber & McOmber, attorneys)
Kenneth B. Fitzsimmons, Esq., for respondent Belmar Board (Sinn, Fitzsimmons, Cantoli, West & Pardes, attorneys)
Vincent DeMaio, Esq., for respondent Manasquan Board (DeMaio & DeMaio, attorneys)

Record Closed: August 11, 1988 Decided: October 12, 1988

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BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE

Petitioners allege that their son, B.B., is being deprived of a thorough and efficient education as required by the New Jersey Constitution (Article VIII, Section IV, paragraph 1) whereby the Board of Education of the Borough of Belmar (Belmar Board) has entered into a sending-receiving relationship with the Board of Education of the City of Asbury Park (Asbury Board), which requires that B.B. attend the Asbury Park High School. Petitioners seek to remove B.B. from the Asbury Park High School and require the Belmar Board to send him and to pay his tuition to the Manasquan Board of Education with which the Belmar Board has a sending-receiving relationship.

PROCEDURAL ASPECTS

Petitioners, through legal counsel, perfected their Petition of Appeal before the Commissioner of Education (Commissioner) on November 5, 1987. The respondent Boards of Education filed their Answers with the Commissioner in a timely manner. On December 2, 1987, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Subsequent to the matter having been transmitted to the OAL but prior to the prehearing conference held on January 13, 1988, both petitioner and respondent Asbury Park Board propounded motions for determination by this tribunal. Petitioner moved for an Accelerated Schedule of Proceedings, pursuant to N.J.A.C. 1:1-9.4, which was subsequently resolved at the January 13, 1988 prehearing conference. Respondent Asbury Park Board cross-moved to Dismiss the Petition of Appeal for Failure to State a Claim. After carefully considering the parties legal arguments, by way of letter memoranda, this tribunal denied respondent Asbury Park Board's motion and ordered the matter to proceed to hearing (See Decision on Motion, February 9, 1988).

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On January 13, 1988, the first of a series of prehearing conferences was held at which, among other things, the issues to be determined were agreed upon and hearing dates were established to commence on May 16, 1988 and continue through to June 15, 1988. On May 6, 1988, a second prehearing was held. There, the parties agreed to bifurcate the proceedings; i.e., the first, or liability phase, involving only petitioner and the Asbury Park Board at a hearing and; the second, or remedies phase, involving all parties in interest as a matter of law with their respective arguments set forth by way of briefs of law. The hearing schedule, as originally agreed upon, was to be maintained. In addition, counsel for petitioner represented that he would answer the Asbury Park Board's interrogatories (which were due on March 24, 1988) and hand-deliver them to the Board's attorney on May 6, 1988.

On May 9, 1988, five court days prior to the first scheduled hearing day of May 16, 1988, Asbury Park Board propounded a Motion In Limine asserting that the hand-delivered interrogatories remained totally unanswered and requested the following relief:

1. A dismissal of the Petition without prejudice until such time as all interrogatory questions are completely answered.

2. In the alternative, a delay in the proceedings for as long as it takes for the petitioner to completely answer all interrogatory questions.

3. In the alternative, if the proceeding is to go forward, an order limiting the petitioner to the information supplied in its present answers to interrogatories.

4. All costs incurred by the respondent due to the gamesmanship of the petitioner and the petitioner's attorney.

On May 10, 1988, the undersigned initiated a telephone conference call with counsel for petitioner and counsel for the Asbury Park Board. Petitioners' counsel assured this tribunal that all discovery problems would be resolved prior to the first day of hearing on May 16, 1988. Counsel for the Board was granted leave to

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propound its Motion In Limine in the event counsel for petitioner failed to meet his discovery obligations.

Upon opening the record on May 16, 1988, counsel for the Asbury Park Board renewed his Motion In Limine due to petitioners counsel's failure to complete and supply discovery to counsel. Oral argument was heard on the motion subsequent to which this tribunal ordered petitioner's counsel to complete all discovery by the conclusion of the business day on May 17, 1988 and to deliver the completed discovery to all respondent boards of education. The hearing dates of May 16 through 20, 1988 were adjourned with the admonition that all parties be prepared to move forward on Monday, May 23, 1988. It was also established that a conference call was to be initiated by the undersigned with all attorneys on May 19, 1988, to determine the extent to which petitioner's counsel had complied with this tribunal's order.

Subsequent to the adjournment of the first day of hearing on May 16, 1988 at approximately 2:30 p.m., the undersigned was advised that petitioner P.B. had discharged her attorney and elected to move forward pro se.

Petitioner also advised this tribunal that she wished to abandon and withdraw issue No. 1 as it appeared in the Prehearing Order dated January 19, 1988. Issue No. 1 states as follows:

> Whether the Belmar Board, by way of its sending-receiving relationship with the Asbury Park Board is in compliance with the New Jersey constitutional mandate to provide B.B. with a thorough and efficient education?

Petitioner advised this tribunal that she wished to move forward with Issue No. 2 which states as follows:

> Whether B.B.'s State and United States Constitutional equal protection rights have been violated by the Belmar Board and/or the Asbury Park Board?

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Subsequent telephone conference calls held on May 19 and 24, 1988 established that: (1) Issue No. 2 was a matter of law and would be argued by way of legal briefs; (2) There was no need for a plenary hearing and, therefore, the hearing dates were adjourned; and, (3) The parties would enter into a stipulation of facts. The May 24, 1988 prehearing conference established that counsel for the Belmar Board was to submit a draft of the Stipulation of Facts to the parties, with any and all objections or exceptions resolved on or before June 10, 1988. It was also agreed that petitioner's brief was due on July 8, 1988 and the respondent Board's briefs were due on July 29, 1988 with respect to Issue No. 2 in the January 19, 1988 Prehearing Order.

On June 14, 1988, counsel for the Belmar Board submitted the Stipulation of Facts to which petitioner had no objections except to paragraph No. 8 therein. The Stipulations and petitioners exceptions are set forth post.

On July 7, 1988, the undersigned was in receipt of petitioners argument with respect to Issue No. 2.

By way of letter dated July 7, 1988, counsel for the Belmar Board informed this tribunal that petitioner had advised the Belmar Superintendent of Schools that her son and the subject of this litigation, B.B., had been accepted into the vocational educational program known as the Marine Academy of Science and Technology (MAST) commencing September 1, 1988. Based on this fact, that B.B. had voluntarily enrolled in the MAST program and would not be attending Asbury Park High School for the 1988-89 school year, it was counsel's belief that the herein litigation was moot. Counsel, therefore, requested that petitioner consider dismissing this action without prejudice. By way of an undated letter, received by the undersigned July 13, 1988, petitioner refused to consider dismissing her Petition of Appeal.

On July 29, 1988, the Belmar Board propounded its Motion to Dismiss grounded on mootness, together with a letter brief in support thereof. The Manasquan Board joined the Belmar Board in its Motion to Dismiss while the Asbury Park Board takes no position with regard thereto.

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This completes a recital of the pertinent procedural and historical aspects of this matter.

STIPULATION OF FACTS

The stipulated facts and exception thereto, as agreed to by the parties to this controversy, are set forth hereinbelow as follows:

1. Exhibit "A" is the high school assignment policy adopted on July 17, 1975 by the Belmar Board of Education. This policy embodies the lottery system of assignment.

2. Exhibit "B" is the current high school assignment policy of Belmar. This policy applies seniority in assignment by determining the number of total resident years in Belmar after preference is given under the "sibling policy" to a student having a brother or sister who, in the year of assignment, is attending either Manasquan or Asbury Park High School. The sibling has the right to choose to attend the high school that his/her brother or sister is attending in the year the assignment is made by the Board.

3. Exhibit "C" is a letter sent to the parents of students subject to the assignment policy. This letter is dated September 27, 1985. Two items were attached to the letter. One was the Belmar High School Assignment Policy and the second was a preference response to be executed by the student's parent.

4. Exhibit "D" is the Preference Survey dated October 11, 1985 returned to Belmar by petitioners.

5. Exhibit "E" is the seniority list developed by the Belmar Superintendent of Schools after receiving parental responses to the September 27th letter (Exhibit "C"). This high school seniority list shows the name of each student, the date the student entered the district, the grade of entry and the parental choice for high school assignment.

6. Exhibit "F" is a "Composite 1986/87 High School Seniority List". This list

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shows the earliest grade year in which a student develops seniority, the name of the student, the printed letter M or AP showing high school preference; and the cut-off point at which the mandated ratio for assignment to one of the schools (Manasquan) was met, thus, requiring the remaining students to be assigned to the other receiving high school (Asbury Park). The cut-off point shown is after the 34th student enrolled at the first grade level.

7. Exhibit "G" is a copy of a letter dated October 15, 1985 sent by the Belmar Superintendent of Schools to the petitioners indicating the student's assignment to Asbury Park High School.

8. Petitioner, B.B., was assigned to Asbury Park High School by the Belmar Board of Education taking the following steps. First, a letter was sent to the petitioners informing them that the assignment policy would be carried out, enclosing a copy of the policy and providing a preference sheet (see Exhibit "C"). Next, parents returned the preference sheet to indicate a choice of public high schools or notify the district that the student would be attending a private school (See Exhibit "D"). The Superintendent of Schools then compiled data to determine seniority for the purpose of assignment (See Exhibit "E"). Next, the Superintendent calculated the necessary number of students to be assigned to the high schools to meet the requirement that 55.7% of the students be assigned to Manasquan and that 44.3% of the students be assigned to Asbury Park based upon total high school enrollment.

After making this calculation, the Superintendent developed a seniority list by grade entry into the district. (See Exhibit "F"). Once the mandated percentage was met in one high school, the balance of the students were assigned to the remaining high school. In the fall of 1985, this cut-off was made at the end of the first grade. At that point, the students have the greater seniority filled the slots for Manasquan. The remaining students, who entered school from grade two or higher, were assigned to Asbury Park.

B.B. entered the district in sixth grade. He was 47th in seniority of 63 students. Because the cut-off point was developed when the 34th student was assigned to Manasquan, the students having seniority status from 35 to 63 were

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assigned to Asbury Park. Confirmation of the assignment was sent to each student. The letter to the petitioners was sent on October 15, 1985 (See Exhibit "G").

Subsequent to the petitioners receiving notice of their son's assignment to Asbury Park, they sought other educational alternatives. They made application to the Marine Academy of Science and Technology (MAST) operated under the auspices of the Monmouth County Vocational School System. This school is located at Sandy Hook, New Jersey. B.B. was successful in his application to MAST and was accepted into that program for the 1986/87 school year (ninth grade). In June of 1987, the petitioners were notified by MAST that B.B. would not be invited to participate in the program for the ensuing school year. The petitioners apprised the Belmar Superintendent that their child would not be attending the MAST program for the 1987/1988 school year. Based on that notification, the Belmar Superintendent reaffirmed the student's assignment to the Asbury Park High School. The petitioners appealed the assignment made by the Superintendent to the Board's High School Appeals Committee in an effort to have their son assigned to Manasquan High School. This appeal was rejected by the Appeals Committee.

For the 1987/1988 school year, B.B. was enrolled in the Asbury Park High School as a ninth grade pupil. The enrollment in ninth grade was based upon his failure to successfully complete and receive any credits for the ninth grade program taken at MAST. The Verified Petition of Appeal was filed with the Department of Education by letter dated november 4, 1987.

Petitioner agrees with paragraphs one, two, three and four above. Except to add in paragraph four there were two appeals; one in September 1987 and again in October 1987, whereby B.B.'s psychiatrist submitted an evaluation of B.B. with respect to his emotional state upon learning of his reassignment to the Asbury Park High School.

With regard to paragraph five above, petitioner asserts that B.B. received eight credits at MAST and attended Wall Township Board's summer school where he earned an additional ten credits. Petitioner asserts that B.B. entered Asbury High School with 18 credits; seven short of classification as a sophomore.

9. The mandated ratio of students to be assigned to Asbury Park High School

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was established in the case of *Board of Education of the City of Asbury Park v. Board of Education of the Borough of Belmar*, 1967 S.L.D. 275. In that case, the Commissioner of Education decided on September 22, 1967 that "...unless a proper change of allocation is effected in accordance with law, respondent must assign 44.3% of its high school tuition pupils to Asbury Park High School." The Commissioner's Decision was based upon R.S. 18:18-7 which, provided in part, that "If no such allocation or apportionment of pupils has been made by resolution of the Board of Education of such district prior to the academic year 1943-44, the actual allocation and apportionment of pupils to the designated high schools in effect in the academic year 1943-44 shall be deemed to be the allocation and apportionment of pupils for the purpose of this section." (The current statute is N.J.S.A. 18A:38-12).

At page 276 of the Commissioner's Decision, he determined that tuition pupils from Belmar enrolled in receiving high schools for the 1943-44 year was as follows:

Asbury Park High School.....44.3%
Manasquan High School.....54.3%
Neptune Township High School.....1.4%

Belmar's relationship with Neptune Township was abandoned by mutual consent and the 1.4% of students attending Neptune were sent to Manasquan, thus, Manasquan became the recipient of 55.7% of Belmar's high school tuition pupils.

10. In 1978, Asbury Park instituted further litigation against Belmar. See *Board of Education of the City of Asbury Park v. Boards of Education of the Boroughs of Belmar and Manasquan, Monmouth County*, 1979 S.L.D. 308. A plenary hearing was conducted on June 1, 1978 relating to Asbury Park's allegations that Belmar had failed to comply with the provisions of N.J.S.A. 18A:38-12 by allowing the percentage of its pupils to drop below the 44.3 mandated percentage ratio and to demand that the relationship between Belmar and Manasquan be terminated so that all of Belmar students would be directed to attend Asbury Park. Asbury Park also challenged the propriety of Belmar's assignment policy.

At page 312, the hearing examiner made the following

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finding:

"It is also recommended that the Commissioner deny petitioner's request for a directive that would hold the Belmar Board's policies on siblings and random drawing selection to be improper."

The hearing examiner also recommended, at Page 313, that:

"It is further recommended that the Commissioner direct the Belmar Board to assign late enrollees and those who fail to comply with deadlines for questionnaires to either Manasquan High School or Asbury Park High School in such fashion as will most closely approximate the required ratio of Belmar pupils at those schools."

The Commissioner adopted the hearing examiner's findings of fact (See page 313) except for modifications and findings which are unrelated to this litigation.

11. Despite the Commissioner's rejection of Asbury Park's challenge to the sibling and random draw policy, the Asbury Park Board continued its request that Belmar investigate an alternative methodology for the assignment of its pupils. Asbury Park continued to complain that Belmar's random draw (lottery) created a divisive feeling that losers go to Asbury Park. This perception was testified to by the Asbury Park Superintendent of Schools as noted in the findings of the hearing officer. See page 311. Asbury Park succeeded in convincing the Belmar Board that the lottery policy placed Asbury Park in a bad light and was educationally unsound. Accordingly, Belmar revised its policy in the fall of 1979 to eliminate the lottery system. The policy adopted on November 8, 1979 is set forth on Exhibit "B". this established the policy of seniority after sibling choice was exhausted.

This concludes the recital of the stipulated facts.

ARGUMENTS OF THE PARTIES

PETITIONER'S POSITION

Petitioner asserts in her letter, undated but received at the OAL on July 7, 1988, that her family moved into the Belmar school district in September 1983. Subsequently, when the time arrived for her son, B.B., to consider his high school

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education, the family was advised that B.B. could not attend the Manasquan High School because the family's residence in the Belmar school district was not of sufficient length in time to permit B.B. to attend Manasquan under the Board's policy.

Petitioner contends that New Jersey and United States Constitutions provide for equal opportunity for education. She contends, further, that the Belmar Board has clearly ignored these constitutional provisions when it disbanded its lottery system of selection of pupils to attend the Manasquan High School in favor of the seniority of residence system now in use. Petitioner argues that the former lottery system of selection at least gave every pupil an equal chance of assignment to either Manasquan or Asbury Park high schools.

Petitioner asserts that the Belmar Board abandoned the lottery system of selection in favor of the residence seniority approximately seven years ago. As of 1988, a pupil would have had to be born in the Belmar school district to have an equal opportunity of freedom of choice as to which senior high school the pupil is to attend. Those pupils who have moved into the school-community subsequent to their birth have no opportunity to a decent education. [1]

In her letter brief dated July 21, 1988, petitioner reiterates the equal opportunity arguments set forth above. In addition, she argues that whether or not her son will attend a vocational school rather than the Asbury Park High School in September 1988, this circumstance has no bearing on her request for a legal decision in the instant matter. Petitioner asks; "Do I not have the right as a taxpayer to challenge the Board's unfair assignment policy?" And; "Do I not have the right, as a mother of two younger children who will be of high school age in 24 months, to challenge the Board's unfair policies?" To which she responds that she believes she has such a right.

---

[1] Petitioner set forth certain factual allegations concerning an unnamed Belmar Board of Education member with regard to the Board's amendment to its sibling attendance rule and preferential retroactive treatment to military personnel. Petitioners allegations were not supported by way of affidavit or certification, therefore, neither is set forth nor considered here.

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Petitioner, therefore, respectfully requests that the instant matter move forward with a decision on the merits of the controversy.

THE BELMAR BOARD'S POSITION JOINED BY THE MANASQUAN BOARD

The respondent Belmar Board, joined by respondent Manasquan Board, sets forth its legal position in support of its motion to dismiss the herein petition on the grounds of mootness. The Belmar Board asserts that subsequent to the filing of the herein Petition of Appeal, petitioners son, B.B., was accepted in to the MAST vocational program commencing September 1, 1988. Respondent asserts that it is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. *Oxfeld v. N.J. State Bd. of Ed.*, 68 N.J. 212-213 (1975); *Sente v. Clifton Mayor and Mun. Coun*. 66 N.J. 204, 206 (1974). There are two basic reasons for this doctrine. First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed. *Anderson v. Sills*, 143 N.J. Super. 432, 437 (Ch. 1976).

Similarly, the Commissioner has often held that he will not decide cases which are moot. *Weehawken Education Association v. Bd. of Ed. of Tp. of Weehawken*, 1978 S.L.D. 924, 925 and cases cited therein.

Respondent argues that in the case at bar, the acceptance of B.B. into the MAST program has removed the "concrete adversity of interest" which existed at the inception of the litigation and the "immediacy of the controversy" has been substantially diminished. Although it is possible that subsequent events may lead petitioners to seek to withdraw their son from the MAST program and seek his enrollment in the Manasquan High School, such an eventuality is merely speculation at this time, and as such, the instant petition presents an issue which is currently

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only hypothetical. Petitioner contends in her letter of July 21, 1988 that after a year of legal proceedings including many legal documents, hearings and conference calls, it would be unfair to "casually" dismiss the case. As the cited passage from *Anderson v. Sills*, supra. makes clear, a moot case will ordinarily be dismissed "regardless of the stage to which the litigation has progressed."

Respondent observes that courts do have the power to decide cases which have become moot if it is in the public interest to do so, *Busik v. Levine*, 63 N.J. 351, 363-364 (1973), however the exercise of such power is rare and should be employed with great circumspection. Thus the New Jersey Supreme Court refused to decide a case involving regulation of students distributing pamphlets and leaflets on schools grounds, where the case was mooted by the fact that the student plaintiffs no longer attended the defendant school district. *Oxfeld v. New Jersey State Board of Education*, 68 N.J. 301 (1975). The court declined to render a decision notwithstanding the significant issue or prior restraint of first amendment rights implicated in the case and notwithstanding that the Appellant Division had done so at a time when the case was already moot.

By contrast, the Supreme Court has on two occasions decided whether a lower court may order blood transfusions for Jehovah's witnesses, even though the cases were moot by the time they were argued before the court because the transfusions had already taken place pursuant to a lower court (and indeed, in one case the patient had already died at the time the Supreme Court heard the case). *State v. Perrricone*, 37 N.J. 463 (1962) (child patient); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 577 (1971). (adult patient). Similarly, the court decided a case brought by a hospital to compel a transfusion for a pregnant woman and her unborn child despite the fact that the woman had departed from the hospital, leaving it "doubtful whether the hospital has a remaining interest." The court noted the likelihood that the matter "would arise again at the instance of an interest party" since there was a probability that the mother would hemorrhage at some point in the pregnancy. *Raleigh Fitkin - Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 423 (1964).

Respondent contends that the foregoing cases were of sufficient public interest to require decision because of the life and death urgency in which such cases arise. The public interest in having binding precedent set by the Supreme

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Court for lower courts to follow in such emergent cases outweighed judicial reluctance to decide moot cases. In the third case, even more compelling was the continuing "immediacy" of the controversy since the issue was likely to arise again with the very same patient (and since the lower court had held against the hospital, which the Supreme Court reversed).

Respondent cites the matter in *Delaware River and Bay Auth. v. International Org., etc.* 45 N.J. 138 (1965), the Supreme Court decided an appeal from an order enjoining picketing. At issue was whether employees of the Authority, created by interstate compact, were "public employees" forbidden the power to strike. At the time the appeal was heard, the restraint had already been dissolved, presumably because picketing had stopped, however the court passed by the suggestion of mootness. Apparently, the issue of whether employees of an "authority" are public employees deprived of the ability to strike, having implications for the multitude of authorities throughout the State and their thousands of employees, was of such weight as to require a definitive pronouncement by the Supreme Court, notwithstanding mootness.

In *Cook e v. Tramburg*, 43 N.J. 514 (1964), the Supreme Court decided whether Black Muslim inmates of State prisons have a right to hold religious services. Although the plaintiff was no longer incarcerated, the court noted that suit had been filed as a class action and proceeded to a decision.

In *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 N.J. 17, 22 (1973), the Supreme Court, noting that neither party had raised the issue of mootness and that both parties were desirous of a decision, considered the arbitrability of a decision by a school board to consolidate departments, notwithstanding that the board subsequently separated the departments after one school year.

Respondent contends that the foregoing survey of cases demonstrates several different factors which might play in a court's decision to decide a case notwithstanding mootness. Factors such as mutual desire of the parties to have a decision rendered; existence of a class action; or emergent nature of future cases in which the substantive issue would be expected to arise, making binding precedent advisable, are not present in the case at bar. Nor is there any reason to believe that this case presents an issue the decision of which might provide broad statewide or

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even county-wide guidance as in *Delaware River and Bay Auth.* and *Dunellen*, both supra., since there is no indication that the residency-seniority system utilized by Belmar for high school assignment is utilized in other districts with multiple sending-receiving relationships.

Moreover, respondent submits, that the majority of instances in which mootness is disregarded in favor of a decision on the merits are decisions of appellate tribunals. As the decisions of such tribunals have far greater weight than a trial court or administrative court as precedent under the principles of *stare decisis*, such courts exercise greater discretion in determining what would otherwise be moot cases. An administrative or trial court, however, must be extremely circumspect in determining whether to decide cases where problems such as mootness, ripeness, or standing are present. Indeed, the Commissioner of Education has been notably reluctant to decide moot cases and has, as far as respondent's research has been able to determine, done so on only one occasion. *G.F. v. Bd. of Ed. of Washington Tp.*, 1980 S.L.D. 20.

Respondent argues that for the reasons set forth above, the petition should be dismissed as moot.

DISCUSSION AND CONCLUSIONS

The admitted and undisputed facts clearly demonstrates that B.B., the subject of this controversy, is no longer an enrolled pupil in the Asbury Park High School. Rather. B.B. commenced attendance in the MAST vocational program on or about September 1, 1988. As a consequence of petitioner's action to voluntarily remove B.B. from the Asbury Park High School, B.B. is no longer subject to the direction and control of the Asbury Park Board policies. B.B. is now subject to the direction and control of MAST, N.J.A.C. 18A:54C-1 et seq. with the Belmar Board committed to pay B.B.'s tuition to MAST, N.J.A.C 18A:54C-5, rather than the Asbury Park Board for B.B.'s secondary school education. Under these uncontroverted facts, there is no remedy this tribunal nor the Commissioner could render in the event petitioners prevailed on the merits of this dispute.

It has been well settled that the Commissioner, in his quasi-judicial capacity to decide and determine disputes arising under education law, does not decide moot

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issues. *Oxfeld, supra*. *Sharon Pinkham v. Bd. of Ed. of South River, et al.*, 1974 S.L.D. 1103; *Patrick E. Tedesco v. Bd. of Ed. of Lodi*, 1955-56 S.L.D. 69; In the matter of *Moss Estate Inc. v. Metal and Thermit Corp.*, 73 N.J. Super. 56, 67 (Chan. Div. 1962), the Court said

> ....It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and "to decide only concrete contested issues conclusively affecting adversary parties in interest." *Borchard, Declaratory Judgments* (2d ed 1941), pp. 34.35.

I **CONCLUDE**, therefore, that the herein matter is moot as to the issues affecting B.B.

ORDER

Accordingly, it is hereby **ORDERED** that respondent Belmar Board's Motion to Dismiss be and is hereby **GRANTED** by reason of mootness.

Therefore, the herein Petition of Appeal is **DISMISSED WITHOUT PREJUDICE**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

12 October 1988
DATE

LILLARD E. LAW, ALJ

Receipt Acknowledged:

Oct 14, 88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 17 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

dho

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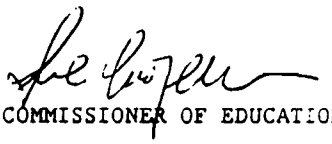
J.B. AND P.B., as parents and natural guardians of B.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the ALJ that the instant matter is moot as to the issues affecting B.B., in that the pupil in question now attends the MAST vocational program and, thus, there is no relief available through the Commissioner in the event petitioners were to prevail on the merits of this matter.

Accordingly, the Commissioner directs that Respondent Belmar Board's Motion to Dismiss is granted by reason of mootness. The instant Petition of Appeal is, therefore, dismissed without prejudice.



COMMISSIONER OF EDUCATION

NOVEMBER 23, 1988

DATE OF MAILING - NOVEMBER 29, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
AND DECISION ON MOTION FOR
INTERIM RELIEF
OAL DKT. NO. EDU 7366-88
AGENCY DKT. NO. 321-9/88

NICOLAE R. SUPURAN, SR., ON BEHALF OF HIS INFANT SON, N.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT LAUREL AND JAMES R. ANZIDE,
Respondents.

Nicolae R. Supuran, Sr., petitioner, pro se
William R. Powers, Jr., Esq., for respondents (Moss, Powers, and Kugler, attorneys)

Record Closed: October 13, 1988 Decided: October 14, 1988

BEFORE **BRUCE R. CAMPBELL, ALJ:**

Nicolae R. Supuran, Sr., petitioner, alleges and the Mount Laurel Township Board of Education, respondent, denies that the Board has arbitrarily refused to admit the petitioner's son, N.S., to kindergarten.

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This matter was opened by the petitioner before the Commissioner of Education on September 30, 1988. Because the pleadings contain an appeal for interim relief, the matter was transmitted without answer to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. See, also, N.J.A.C. 6:24-1.5 (interim relief and a stay of Board action).

A hearing on the interim relief portion of the matter was held on October 12, 1988, at the Office of Administrative Law, Trenton. At the conclusion of argument on October 12, it became apparent that little more would be needed to complete the record.

With the cooperation of both parties, the matter was continued to October 13, 1988. At that time, the petitioner acknowledged that if he were to testify he would say what he had said in argument on the previous day. He moved that his statements of October 12 be admitted as his testimony in this matter. Hearing no objection, I granted the motion.

The petitioner was sworn and cross-examined by Board counsel. The Board presented two witnesses, the principal of Hillside Elementary School and the superintendent of schools.

The basic facts are not in dispute. The petitoner and his family began to move from Long Island to Mount Laurel on or about August 20, 1988. On or about August 30, the petitoner's wife took N.S. to the Hillside Elementary School for enrollment. The principal arranged for a Kindergarten Readiness Inventory test to be administered to N.S. on the following day. On August 31, either Mr. or Mrs. Supuran advised the Hillside School office that N.S. would not be registered for kindergarten. The pupil personnel folder that the district began for N.S. bears the following notation, "8/31/88: Parent called: MOVED TO NEW YORK."

Ms. Supuran and N.S. returned to Long Island. N.S. had been preregistered in the Long Island school district before the family moved to New Jersey. N.S. attended kindergarten classes in the Long Island district for six days.

On September 19 the petitioner took N.S. to the Hillside Elementary School and spoke with the principal. The petitioner requested that his son be admitted as a transfer student from New York. The principal examined transfer papers from the Long

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Island district noting that the child was not yet five years of age and that the child had attended kindergarten for six days. The principal advised the petitioner that the principal would check with the superintendent of schools. The principal did not know if registration in the Long Island district was pertinent. The child had been preregistered less than a month before in the Mount Laurel district. The petitioner insisted that the child was a transfer pupil and asked the principal to throw away the August registration.

Later that day, the superintendent decided that the child would not be accepted. The principal communicated this to the respondent. The respondent then called the superintendent. The two were able to speak on the next day. Despite a rather long conversation, no accord was reached and this petition, including a request for interim relief, was filed on September 30, 1988. The Board's answer was served in person upon the respondent on Wednesday, October 12 at oral argument. The Board's counsel filed two copies of the answer with me at the same time.

OTHER RELEVANT EVIDENCE

The petitioner testified that he was not aware of Board policies or New Jersey statutes concerning age of admittance before September 19. On cross-examination, he testified that he knew "by hearsay" of policies concerning age for admission and policies concerning transfer of pupils before September 19. "People at work" had told him of these things, but his first official knowledge came on September 20 when the superintendent gave him a copy of the Board's policy No. 502 (R-1). In addition, the petitioner testified that his in-laws had inquired of another school district concerning transfers in from other districts. The inquiry was made before September 19.

The petitioner also testified that in his conversation with the superintendent he asked for a copy of Board policy No. 502 and asked to address the Board at its meeting of September 27. Under his reading of the policy, his son was and is qualified to be enrolled in the Mount Laurel schools now. He placed another call to the superintendent asking that the superintendent please review the policy to see if he had not made an error.

The petitioner also stated that the superintendent and principal gave him the impression that they wanted to prevent his child's registration. The petitioner contacted Board members directly before the September 27 meeting. He also contacted two attorneys and was advised that the Mount Laurel policy was a fairly common one. On the

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Saturday before the Board meeting, the petitioner visited the State Library in Trenton and did some research on the matter. He cites in support of his position Petition of Turtz, 1979 S.L.D. 499 and Wilcox v. Oceanport Bd. of Ed. 1954-1955 S.L.D. 75.

The petitioner maintains that the Board's policy does not require a child to meet any limits as to the length of time he must have attended a school outside of the district in order to be considered a bona fide transfer. The petitioner also insists that the superintendent "could not impose additional requirements." The policy in paragraph A.2 uses the word "may." However, the policy favors denial of education.

The principal's testimony was, in the main, consistent with that of the petitioner. The principal presented N.S.'s pupil personnel folder (R-2). The petitioner identified the signature on the folder as his wife's. The principal stated that the petitioner arrived at his school on September 19, declared he was aware of the transfer policy and the school had to admit N.S. as a transfer pupil. The principal checked the policy and arranged for N.S. to be assessed. The school secretary then informed the principal that the petitioner's wife had begun to register N.S. on or about August 30. The principal informed the petitoner that the principal would have to discuss the matter with the superintendent. He did so on the afternoon of September 19 and the superintendent decided not to admit the pupil. The principal also stated that he assumed N.S. to be five years of age when the petitioner brought him to the school. The assessment was given to N.S. as a matter of routine. It is given to all pupils who have met the age cut-off dates to determine whether they should be assigned to a regular or developmental kindergarten. There is no dispute that N.S. did well on the assessment.

The principal also testified that it is his role to administer policy; interpretation is for the superintendent. The principal has had no experience with under-age transfers in his thirteen years at the school. The district is looking out for the best interest of pupils. It has no policy discriminating between legitimate transfer situations and cases in which a parent is trying to "beat the system."

If any pupil were presented at his school with only six days' experience in another school, the principal would question further. He would counsel parents as to placing a child in a class with children perhaps sixteen months older. He would also counsel the parents concerning the developmental steps a child goes through at this particular stage.

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The superintendent of schools testified that policy No. 502 was revised in 1983 at his request. Under the former policy, parents were appealing in cases wherein their children had attended other, usually private, schools. He believed the district should set an age criterion irrespective of attendance in other schools. He also asked the Board for some administrative leeway. The superintendent stated that the wording of the present policy is intended to provide for administrative discretion.

The district's primary concern is the social and emotional readiness of children. Based on local informal studies as well as nationally recognized research, the district believes that chronological age is the most important factor in determining whether a child, particularly a male child, will do well not only in his first year of school but throughout his school career.

The superintendent stated that he determined to deny N.S.'s admission on the basis of age. The superintendent had no background of previous success in a kindergarten to review. The six days' attendance in the Long Island school district were insufficient to base any judgment upon. The superintendent believes, based on age, that N.S. should not be admitted to the Mount Laurel Schools. There is no other child N.S.'s age in kindergarten in the Mount Laurel school district at this time.

DISCUSSION AND DETERMINATION

This case involves only one issue and one sub-issue. The primary issue is interpretation of Board Policy No. 502. The sub-issue is whether the administrators acted in an arbitrary or capricious manner when applying their interpretation of the policy to N.S. For the reasons that follow, I **CONCLUDE** that there has been no abuse of administrative discretion in this case.

The pertinent part of the policy reads as follows:

> **AGE OF ENTRANCE**
>
> It is the opinion of the Administration of the Mount Laurel Public Schools that to enter a child too early into a classroom situation is to make a potential academic, social, or emotional problem for the child in later school life. A child should have emotional, social, and physical maturity, as well as learning potential, to be successful in the classroom situation.

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> Therefore, the Mount Laurel Public Schools will attempt to enrich the school program for the intellectually gifted child, rather than to skip grades. To enter a child prematurely into school or attempt to set a pace which will place the child in a frustrating situation in relation to his or her social, emotional, and physical development should be avoided.
>
> A. Entering Children into Kindergarten
>
> 1. A child must have obtained the chronological age of five years, no months on or before October first to be registered in the kindergarten class.
>
> 2. A child transferred into the Mount Laurel School District from a public school may be acceptd although the child may not meet the age requirements stipulated in paragraph A1. In order to determine whether to accept an underage student transferring into the district, the child will be tested to determine whether he or she meets the standards for grade level placement.
>
> 3. A child transferred into the Mount Laurel School District from a private school who does not meet the age requirement will not be accepted.

Policies, like rules and statutes, are defined by their language. The words used are to be given their ordinary and well-understood meanings in the absence of any explicit indication to the contrary. Only if an ambiguity exists is it necessary to go beyond the text itself. Ruehl Co. v. Bd. of Trustees for Education 85 N.J. Super. 4 (Law Div. 1964). One of this tribunal's goals is to carry out legislative and administrative purposes and plans. The history of a policy, as testified to here by the superintendent, may be referred to as indicative of purpose and plan. See, Schinek v. Gibb Truck Rental Agency, 69 N.J. Super. 590 (App. Div. 1961). In determining the intent of a policy, just as in determining the legislative intent in a statute, the intent of the entire piece is controlling, and all sections must be read together in light of general intent so that the auxiliary effect of each individual part is made consistent with the whole. Febbi v. Bd. of Review, Div. of Employment Security, 35 N.J. 601 (1961).

Viewing the pertinent part of policy No. 502 in its entirety, it is clear that the Board and administration of the Mount Laurel Public Schools have carefully considered the age of entrance question. N.J.S.A. 18A:38-5 is clear:

> No child under the age of five years shall be admitted to any public school, except as may be provided pursuant to law for children of his age.

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> No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the board may in its discretion admit any such pupil if he or she meets such entrance requirements as may be established by rules or regulations of the board.

Nothing in the portion of policy cited above is inconsistent with the statute. I **FIND** policy No. 502 to be consistent with N.J.S.A. 18A:38-5 and well within the compass of general powers delegated by the Legislature to boards of education by N.J.S.A. 18A:11-1. I also **FIND** that subparagraph A.2, if read strictly, would seem only to require that an underage student attempting to transfer into the district test at an acceptable level. And, indeed, that has happened in the present case.

However, while statutes, rules and policies of a penal nature are to be strictly construed, statutes, rules and policies of a remedial nature are to be liberally construed. Furthermore,

> The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal. Kenney v. Board of Education of Montclair, 1938 SLD 647 (1935), affirmed State Board of Education 649, 653 (1935).

The superintendent in this matter was presented with a child who had attended a public school for merely six days. A strict reading of the policy would produce the result the respondent desires but would be contrary to the district's philosophy and operating tenets. I **FIND** that the superintendent, based on all the facts known to him, properly decided that six days' attendance in another school district, while meeting the letter of the policy, was clearly contrary to its intent.

I further **FIND** that six days' attendance in a kindergarten in another district was an inadequate base for reaching any judgments concerning the readiness of the subject pupil to begin his formal schooling, particularly where that beginning would be in a situation in which he was the youngest member of the group.

The petitioner asserts in his arguments that the absence of the word "and" between the paragraphs of the policy is important in that it divorces the import of each paragraph from that of each other paragraph. This argument must be rejected. The

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petitioner works in computer software and is familar with the concept that the word "and" usually narrows a consideration by adding criteria and use of the word "or" usually widens a consideration by giving alternatives. For example, if one were searching for research journal articles on apples and pears, one would probably find fewer articles than if the criteria were apples or pears. In the first situation, an article would have to address both apples and pears in order to be selected. In the second situation, any article mentioning apples or pears, not necessarily together, would be selected.

While this logic is appropriate to computer software, it is not precisely analogous to legislative interpretation. Although the interpretation of statutes, rules and policies often refers to the conjunctive and the disjunctive, it is also true that the conjunctions "and" and "or" are frequently used interchangeably. Allstate Ins. Co. v. Howard Sav. Inst., 127 N.J. Super. 479 (Ch. Div. 1974). The present policy is constructed to be read and applied conjunctively.

Wilcox, above, is inapplicable to the present case. Wilcox, decided in 1954, required that a transfer take place. Enactment of N.J.S.A. 18A:38-5, above, in 1967 effectively overruled Wilcox. Turtz, above, is distinguishable from the present case. Turtz involved a child who had completed an approved kindergarten program in stark contrast to the present case in which the child has a total of six days' attendance in a kindergarten program. Further, Turtz dealt with examination for promotion to first grade, not for enrollment in kindergarten.

In addition to the foregoing, I **FIND**:

1. The petitioner had sufficient knowledge of kindergarten entrance requirements of the Mount Laurel School District, prior to September 19, 1988, so that he realized his son would not qualify for admission in the 1988-89 school year.

2. The petitioner or his wife attempted to register N.S. in the Mount Laurel public schools on August 30, 1988.

3. The petitioner or his wife called the Hillside Elementary School on August 31, 1988 and advised the school that the child was moving to New York.

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4. The petitioner caused his son to attend a public kindergarten program in Long Island for six days in early September 1988.

5. On September 19, 1988 the petitioner attempted to enroll his son in the Mount Laurel public schools as a transfer pupil.

6. The school administration properly denied the attempted transfer on the basis of insufficient kindergarten experience.

I further **FIND** that even if the Board's agents had mistakenly applied policy No. 502, the petitioner's patent attempt to circumvent the sound basis of the policy would be reason enough to reject the attempted transfer. The alternative would open the door to untold abuse. If six days' attendance in a kindergarten were sufficient to overcome the beneficent educational goals of the policy, why not five days or one day?

In consideration of the foregoing, I **CONCLUDE** that the administration and the Board of Education in this matter have not abused their legislatively invested authority. I **CONCLUDE** that the exclusion of N.S. from kindergarten in the Mount Laurel Public Schools for the 1988-89 school year was neither arbitrary nor capricious. It is well-settled that it is not a proper exercise of the judicial function for the Commissioner of Education or this tribunal to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7, 13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E.&A.1948).

Accordingly, I **DENY** the motion for interim relief and I **ORDER** the present petition of appeal **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

14 OCTOBER 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10/17/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 19 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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NICOLAE R. SUPURAN, SR., on behalf of his infant son, N.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT LAUREL AND JAMES R. ANZIDE, BURLINGTON COUNTY,	:	DECISION AND DECISION ON MOTION
RESPONDENTS.	:	

The record, initial decision and decision on motion for interim relief rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-18.4, a summary of which is provided below.

Petitioner's exceptions are essentially those presented in the transcripts of this matter which are incorporated by reference herein. Moreover, petitioner believes that the ALJ did not make the connection of stated facts in relation to how the district interprets and enforces its Kindergarten Policy (R-1, Policy No. 502). He reiterates that he had secondhand information that the district accepts transfer students regardless of age and that his statement to the principal that age was not a requirement with transfers was only a "BLUFF" on his part to force him to accept his son if there were any way the policy stated so. He also questions, based on his experience in talking with parents and teachers, if they and even the principal and superintendent, are aware of the policy.

Petitioner likewise takes exception to the ALJ's conclusion that no abuse of administrative discretion occurred in this matter, objecting to the judge's implied acceptance of the superintendent's "time test" and "administrative discretion" position on the meaning of Policy No. 502 and the rejection of the applicability of Turtz, supra. Further, petitioner addresses comments in his exceptions to Regulation #5020 on kindergarten registration which was not part of the record and therefore may not be considered in rendering the final decision in this matter.

Petitioner, while recognizing that Wilcox, supra, (decided in 1954) is no longer a valid decision (given the enactment of N.J.S.A. 18A:38-5 in 1967), nevertheless believes the portion of that decision relating to the "time test," namely, the time period the Wilcox child attended the private school before her parent sought transfer to the local district, remains valid. Lastly, petitioner contends that it is irrelevant to his son's achievement that he would be the youngest in the school as 42 days beyond the age requirement has not been proven to be crucial.

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Upon review of the record in this matter including the transcripts of the proceedings, the Commissioner is in full agreement with the findings and conclusions of the ALJ and adopts them as the final decision. Policy No. 502 is found to be a reasonable policy of the Mount Laurel Board which incorporates an age criterion for kindergarten entrance which is neither arbitrary nor capricious. Early admission to kindergarten with and without transfer is strictly a discretionary matter within the powers of a local board and, given the circumstances of this matter, denial of said early admission to petitioner's son is not deemed unreasonable. The record supports a conclusion that petitioner patently attempted to circumvent the transfer element of the policy by enrolling his son for six days in a New York school. As correctly noted by the ALJ, to rule in the alternative "would open the door to untold abuse. If six days' attendance in a kindergarten were sufficient to overcome the beneficent educational goals of the policy, why not five days or one day?" (Initial Decision, ante) The six days' attendance goes not just to the "time-test" criterion petitioner alludes to, but to motivation as well. As to this, the ALJ's credibility determination must be given due regard for, as the trier of fact, he has the opportunity to assess firsthand the credibility of each witness. His conclusions in this regard are, in the Commissioner's judgment, well-reasoned and supported by the record.

Accordingly, for the reasons expressed in the initial decision, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1726-88

AGENCY DKT. NO. 44-3/88

R.W., ON BEHALF OF A.W.,

Petitioners,

v.

SOMERVILLE BOARD OF EDUCATION, JOSEPH ABATE, MICHAEL R. CRISCI, AND JAMES DWYER,

Respondents.

R.W., petitioner, pro se

Steven Offen, Esq., for respondent (Schachter, Cohn, Tromadore & Offen)

Record Closed: September 6, 1988 Decided: October 17, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

R.W. (petitioner) is the father of A.W. a 16-year-old female enrolled in the 10th grade of Somerville High School, operated by the Somerville Board of Education (Board). Petitioner alleges that a 10-day suspension imposed upon A.W. during March 1988 is unlawful and improper because the underlying disciplinary system at the high school violates A.W.'s due process rights and N.J.S.A. 18A:37-2. Alternatively, petitioner alleges the suspension is an arbitrary, capricious, unreasonable and otherwise improper action because school administrators selectively enforce the disciplinary system against A.W. with ill-will and animus. Finally, petitioner alleges the suspension is improper because the basis for the suspension and the suspension itself is contrary to the Board's published disciplinary policy as set forth in the high school student handbook.

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The Commissioner of Education before whom the matter was filed transferred the case on March 16, 1988 to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq. A hearing was scheduled and conducted July 6, 1988 at the Bound Brook Municipal Building, Bound Brook. The record remained open until September 5, 1988 for R.W. to file a reply to the letter memorandum promptly filed by the Board. Therefore, the record closed September 6, 1988. The conclusion is reached in this initial decision that the controverted suspension of A.W. is improper as being imposed in violation of State Board Rules and Regulations regarding pupils who are classified as being in need of special education and as having been imposed in violation of A.W.'s due process rights under law and in violation of A.W.'s due process rights. Finally, this initial decision concludes that no authority exists for the Board's school administrators to place pupils "on probation" during one year for conduct committed during the preceding school year.

BACKGROUND FACTS

I.

The background facts of the matter as can be gleaned from the pleadings, documents (J-1 through J-12 and R-1 through R-6) in evidence, and the testimony of the superintendent, Dr. James J. Dwyer, and vice principal Joseph D. Abate, are these. A.W. began her enrollment at the Somerville high school in September 1985. Prior to that time A.W. had been enrolled in the Hillsborough Township public schools for grade 8 and in the Branchburg Township public schools grades kindergarten through 7.

II.

Documentary evidence reveals that the Branchburg Township schools child study team evaluated A.W. upon the request of her parents. That child study team concluded while A.W. revealed mild perceptual deficits, educational classification under N.J.S.A. 18A:46-1 et seq. was not warranted. A.W. did receive supplemental instruction in language arts. (J-3) Upon her enrollment in the Hillsborough public schools for 8th grade, A.W. was evaluated by the Hillsborough child study team. This team classified A.W. under N.J.S.A. 18A:46-8 as perceptually impaired. (J-3, J-4) A.W. returned to the Branchburg public school system for the completion of her 8th grade of school. The Branchburg child study team continued the classification of A.W. as perceptually impaired

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and in need of a special education program. (J-5). When A.W. entered the Somerville public schools for her 9th grade in 1985-86, the Somerville school authorities continued A.W.'s classification as perceptually impaired. However, the individual educational plan provided that A.W. was to be placed in the 9th grade with resource room support and was otherwise mainstreamed into the regular school program (J-6). During A.W.'s tenth grade at Somerville public school she was placed in a regular grade-level program of tenth grade with resource room support if necessary. A.W. was exempt from the then existing high school proficiency test. (J-7). During the 1987-88 year A.W. continued to be classified as perceptually impaired, was assigned a regular high school 11th grade schedule, and was to be referred to the high school resource room program on an "as needed" basis. A.W. continued to be exempt from the high school proficiency test (J-8) (see also R-5)

III.

The evidence in the record shows that at least during the 1987-88 school year, and more likely since the 1985-86 school year, the Board's policy regarding student discipline is as set forth in the 1987-88 student handbook (J-1). The student handbook contains 24 pages and addresses such matters as the pupil attendance policy, pupil birth certificates, buses, cafeteria, class dues, closing of school, credits, disciplinary procedures, extra curricular activities, homerooms, lockers, point system for the disciplinary policy, report cards, schedules, smoking, suspension from school, and so on. The disciplinary procedures and the point system are set forth at page 7 of the student handbook. Pupils are advised that a point system as reproduced in the handbook has the approval of the student council, the student advisory council, the faculty council, the faculty, and the Board. The point system lists various offenses and points to be accumulated for each offense. Pupils are then advised that if a student accumulates 7 to 10 points the parents will be notified that if 15 points are accumulated suspension may occur. The policy provides that suspensions may be imposed for repeated minor or non-violent transgressions and that the suspension may be in-school or out-of-school at the discretion of the suspending administrator. The policy does provide that if a student goes 3 or more months without accumulating additional points, 3 points would be deducted from their then existing accumulated point system point total. As noted by petitioner R.W., this point system is very similar to and probably patterned after the motor vehicle point system as set forth at N.J.S.A. 39:5-30.5 et seq.

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The assessed points for each specific offense under the policy is as reproduced here:

	OFFENSES	POINTS
A.	Tardiness to school	
	6-10 times	1 ea time
	11-20 times	2 ea time
	21 or more times	3 ea time
B.	Excessive tardiness to class	2
C.	Repeated talking in study	2
D.	Misconduct in halls or cafeteria	2
E.	Loitering after school	2
F.	Eating outside cafeteria	2
G.	Going to locker at unassigned times	2
H.	Parking in school lot without permit or parking in faculty lot	5
I.	Class disruption	3
J.	Failure to report for teacher detention	3
K.	Misconduct during assemble	4
L.	Failure to report to nurse's office when late to school	4
M.	Leaving a class without permission	4
N.	Leaving school grounds	5
O.	Misconduct during Fire Drills	5
P.	Truancy	7
Q.	School bus disruption	6
R.	Class cut	7
S.	Abuse of study hall option plan	4
T.	To cafeteria between classes	2
U.	Failure to report p.m. absence	3
V.	Locker Defacement	3

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W. The Board of Education recognizes that students have the right to express protest and dissatisfaction, provided that the method of protest is appropriate and in accordance with rules and regulations. The Board of Education declares that students who leave class, cut a class, or more than one class, or fail to report to school, or leave school prior to dismissal time, in order to engage in a protest, demonstration, or other unauthorized activity on or off school grounds shall be subject to discipline under the point system. With regard to students in the Middle School or High School, it has been determined that each student who engages in such protest, demonstration, or other unauthorized activity shall receive 12 points for each infraction. Any student who engages in such conduct shall also be subject to points awarded under the point system for other offenses which the student may commit while engaging in such protest, demonstration, or unauthorized activity.

X. Any unlisted offense to be determined by the administrator.

During the 1986-87 year A.W. was suspended from school on December 2, 1986 for the period December 3 through December 16. She was suspended a second time between February 18 through March 3, 1987; a third time between March 11 through March 24; a fourth time between April 7 though April 13, 1987; and, a fifth suspension for the period May 18 through May 29, 1987. (J-9) The document J-9 recites that A.W. was "on probation" after January 12, 1987 and after May 11, 1987. A.W. accumulated 96 point system points between September 22, 1986 and May 18, 1987 (J-9). According to J-9, A.W. was suspended on 5 separate occasions from her regular school program during 1986-87 for a total of 40 days. During 1987-88 A.W. was suspended from her regular school program 3 separate occasions for a total of 17 days.

The high school principal advised petitioner R.W. and his wife, the mother of A.W., by letter dated June 29, 1987, as follows:

> During the 1986-87 school year, your daughter, [A.] was suspended five times. It is obvious to me that something must be done in order to prevent this kind of poor situation for the next school year.
>
> To try to bring about the needed change, I am taking a definite position at this time with the hope that it will be helpful. Therefore, I am informing you that Aimee has been placed on "probation" for the entire 1987-88 school year. If there is any need to consider a suspension she will be given a ten (10) day in-school suspension, rather than the three (3) days we give in most cases.
>
> In addition, if she ever reaches the point where a second suspension is necessary she will be excluded from attending school pending a complete review of the entire situation by me and any

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> other appropriate building administrator and, if necessary, district personnel. The purpose of such a review would be to bring about the behavior modification obviously needed if she is in another year of being given suspensions.
>
> In view of your daughter's past record, I feel I must take this position to see if it can bring about the proper behavior and motivation required for [A.] to benefit from the teacher-learning situation, which is obviously the basic activity of an educational institution***
>
> Disciplinary probation, it is noted, is not mentioned in the student handbook (J-1).

During the 1987-88 year A.W. was suspended in school from March 4 through March 11; she was suspended in school a second occasion between May 17 through May 31; and, she was suspended a in school third time between June 8 through June 10, 1988. The offenses for which A.W. was suspended in 1986-87 included sitting out of her assigned seat; late to school; allegedly cutting a period; alleged truancy; returning late from lunch; allegedly refusing to attend a particular class; alleged truancy; and, failure to report to an assigned class. During 1987-88 the offenses for which A.W. accumulated points on which she was then suspended including failure to report to the nurse's office; late to school; failure to return to class after assembly; failure to serve detention; referring to her teacher with a perjorative term; and, leaving school without permission.

TESTIMONY OF THE VICE PRINCIPAL AND SUPERINTENDENT

Vice principal Joseph Abate testified he had knowledge since September 1986 that A.W. had been classified as being in need of special education. Nevertheless, he never discussed A.W.'s classification with the child study team prior to the imposition of any suspension he imposed upon her. Furthermore, vice principal Abate testified he has not reviewed nor did he seek authority to review any of A.W.'s child study team records. Vice principal Abate relies upon what appears to be a chance conversation sometime during 1986 with a child study supervisor who advised him that while A.W. was classified, she was mainstreamed and therefore was to be treated like any other pupil not classified as being in need of special education. Consequently, Abate believed there was no need for him to discuss any suspensions of A.W. with the child study team. Rather, Abate relied upon his secretary advising the child study team of each and every suspension he imposed upon A.W. and the child study team never advised him not to suspend her without its review.

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Vice principal Abate testified that prior to any suspension he imposed upon A.W., he gave her an informal hearing by calling A.W. to his office, telling her of a reported charge, getting her version, discussing the matter with her, and then deciding to impose the suspension upon her. Finally, vice principal Abate testified that while the student handbook (J-1) makes no mention of probation, that omission is merely an oversight. He discusses with affected pupils the policy of probation. Abate explained that a pupil who gets on probation must serve an entire school year without any suspension in order to be taken off probation. Finally, there is some evidence here (R-1) to show the vice principal advised A.W.'s parents she was on probation.

The suspension in dispute in this case during March 1988 is a result of A.W. not returning to class immediately following an assembly for which she received four points. In Abate's words, A.W. was away from class without permission. The four points increased A.W.'s point total to 17 which made her liable for suspension under the policy set forth in the student handbook (J-1).

Finally, Abate testified that because affected pupils serve suspensions in school, they are not considered absent from the school program.

The superintendent testified he had knowledge A.W. was in need of special education and that she was classified but who was mainstreamed. The superintendent testified that A.W., despite being in need of special education, must be held to the same standards as other pupils not in need of special education.

This concludes a recitation of oral testimony adduced at hearing.

FINDINGS OF FACT

In addition to the undisputed background facts of the matter as set forth above, the oral testimony received at hearing establishes the following facts:

1. A.W. was suspended from regular school attendance during 1986-87 for a total of 40 days without a formal hearing before the Board.

2. A.W. was suspended a total of 17 days during 1987-88 without a formal hearing before the Board.

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3. Vice principal Abate suspended A.W. for the combined periods of 40 days and 17 days in the respective school years without consultation with the child study team.

4. Vice principal Abate and the superintendent had knowledge of A.W.'s classification. Nevertheless, both administrators believed that because A.W. was mainstreamed she was subject to suspension without regard to her disability.

This concludes a recitation of facts established by the testimony of the vice principal and the superintendent.

LEGAL ANALYSIS AND CONCLUSION

Under the New Jersey Constitution, A.W. has a fundamental right to a public school education. While the right to a public school education is basic, it is not an absolute right. The exercise of the right is subject to A.W.'s adherence to lawful conditions. N.J.S.A. 18A:37-1 mandates that a pupil comply with rules, pursue the prescribed course of study and submit to the authority of the teachers and administrators. R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337, 343 (Chan.Div. 1970). Any pupil who is guilty of continued and willful disobedience, or of open defiance of authority, among other things, is liable to punishment and to suspension or expulsion from school. N.J.S.A. 18A:37-2. N.J.S.A. 18A:37-1 to 5 guarantees student discipline and the student's due process rights in proceedings taken by school authorities which could result in the imposition of the serious sanction of suspension. Goss v. Lopez 419 U.S. 565, 95 S.Ct. 729, 42 L. Ed. 2d 725 (1975).

An in school suspension is as severe a discipline imposed upon a pupil as an out-of-school suspension because either suspension includes the temporary cessation of a pupil's right to attend a regular school program. Under R.R., supra, A.W. was entitled to a more formal hearing than a preliminary hearing afforded her by Vice Principal Abate prior to the imposition of seventeen days in-school suspension during 1987-88. Under Goss, supra, A.W. was entitled to a more formal hearing when the combined in-school suspension for 1987-88 reached ten school days. In the absence of a more formal hearing before the Board, A.W.'s procedural due process rights were violated and her substantive rights under the New Jersey Constitution were equally violated.

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Moreover, Vice Principal Abate's view, as well as the view of the superintendent regarding discipline to be imposed upon pupils classified as being in need of special education but who are mainstreamed, appears to be in conflict with State Board rules at N.J.A.C. 6:28-2.8. There, the rules provide in part as follows:

> Educationally handicapped pupils are subject to the same disciplinary procedures as non-handicapped pupils; however:
>
> 1. No educationally handicapped pupil may be disciplined if the pupil's behavior is primarily caused by his/her educational handicap, or
>
> 2. No educationally handicapped pupil may be disciplined if the program that is being provided does not meet the pupil's educational need.
>
> (b) Before a school staff member can discipline an educationally handicapped pupil, consideration shall be given to the nature of the offending behavior in light of the pupil's handicapping condition and educational needs, except as follows:
>
> 1. On a temporary basis, if there is ongoing peril of physical harm to self or other or of substantial disruption to the educational process; or
>
> 2. If there is a component of disciplinary action set forth in the pupil's individual program.
>
> (c) When an educationally handicapped pupil is suspended, the principal shall forward, at the time of suspension, written notification and discription of the reason(s) for such action to the parent(s) with a copy to the child study team
>
> (d) When the suspension of an educationally handicapped pupil exceeds a total of 10 school days accumulated in a school year, the child study team shall review the status of that pupil in order to:

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1. Determine if the behavior which resulted in the suspension was primarily caused by the pupil's handicapping condition;

2. Determine if the pupil's indivudualized ecucation program is appropriate; and

3. Prepare and forward to the principal and parent(s) a written report with recommendations ***

There is no evidence that Vice Principal Abate ever determined whether A.W.'s alleged offensive behavior which resulted in her accumulation of points was primarily caused by her educational handicap. There is no evidence to show Vice Principal Abate, the child study team, the principal, or the superintendent ever determined whether A.W.'s program meets her educational need with respect to her asserted misconduct. In fact, there is no evidence that school authorities ever considered State Board Rules set forth above regarding a discipline to be imposed upon A.W. an educationally handicapped pupil, to insure that such rules were being followed. Accordingly, all suspensions of A.W. from the regular school program during 1987-88 must be set aside as being improvidently imposed upon her.

Finally, no authority was cited to me in law, or in State Board Rules and Regulations, or in local board policy for Vice Principal Abate to impose upon students a system of probation wherein pupils are held accountable in one school year for conduct committed during the preceeding school year.

For all the foregoing reasons, the suspensions of A.W. from regular school attendance during 1987-88 and particularly the contraverted suspension here which occurred during March 1988 is hereby set aside as being improperly imposed upon her. School authorities are directed to insure that the pupil records of A.W. are purged of any reference to in school suspensions imposed upon her during 1987-88. Furthermore, the Board's child study team is directed to immediately evaluate the educational status of A.W. and to develop an appropriate program for her educational need including additional assistance if in its judgment such assistance is warranted.

It is **SO ORDERED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

October 20, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

10/21/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE OCT 25 1988

OFFICE OF ADMINISTRATIVE LAW

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R.W., on behalf of A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, OF THE BOROUGH OF SOMERVILLE ET AL., SOMERSET COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions of both parties were timely received pursuant to the provisions of N.J.A.C. 1:1-18.4 as were the reply exceptions of the Board. However, petitioner's reply exceptions were untimely and are thus not made a part of the Commissioner's consideration of this matter.

Petitioner cites two exceptions to the initial decision. The first avers the decision fails to strike down the point system disciplinary policy promulgated by the Board. Petitioner avers that the policy violates N.J.S.A. 18A:37-2. Citing R.R. v. Board of Education of Shore Regional High School District, 109 N.J. Super. 237 (Ch. 1970), petitioner contends the court in that case held that "public school officials cannot exercise the power to expel or suspend a student where the activity which is the subject of the proposed suspension or expulsion does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." (Petitioner's Exceptions, at p. 1) Citing N.J.S.A. 18A:37-2, petitioner claims that none of the offenses A.W. was alleged to have committed rose to a level warranting suspension.

Petitioner also avers the initial decision fails to adequately address the argument he raised that A.W.'s suspension was motivated by ill will and animus. He avows that the facts illustrate that the suspensions imposed upon his daughter during the 1987-88 school year were arbitrary, capricious, unreasonable and otherwise improper. He cites the letter from Vice Principal Abate as supportive of his contention that such letter was "designed to put A.W. on notice that even minor transgressions would be dealt with punitively by the Vice-Principal." (Id., at p. 2) Petitioner finds the vice principal's attitude inconsistent with N.J.A.C. 6:28-2.8 and avers that such letter reflects the vice principal's "reasoning, without regard to A.W.'s classified status, [that] meeting A.W.'s educational needs were much less important [than] his own need to enforce school discipline policy at all costs." (Id.) Petitioner adds to his argument the incident concerning the prom as further evidence of "a chain of events leading up to the resulting

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denial of [A.W.'s] constitutional rights." (Id., at p. 3) He cites the Petition of Appeal at paragraphs 7-15 as setting forth facts in support of this position.

Petitioner requests that the initial decision be amended to reflect the above concerns.

The Board's exceptions begin with an introductory statement averring that the application for temporary relief was never decided by the ALJ in that a part of A.W.'s in-school suspension was voluntarily postponed pending the outcome on the merits of the Petition of Appeal. "Therefore, A.W., in fact, never served 10 days of in-school suspension with respect to the within matter." (Board's Exceptions, at p. 1)

The Board thereafter recites its version of the facts in the matter and summarizes the testimony of the witnesses, which is incorporated herein by reference. The Board then excepts to the following findings of fact.

First, the Board suggests that the ALJ was incorrect in concluding that A.W. was suspended from regular school attendance, claiming she was suspended "in school" (id., at p. 3) and had the opportunity to attend school through the period of her suspension. The Board suggests there is a significant difference between in-school suspension and out-of-school suspension, which it discusses in its legal objections to the initial decision, below.

The Board also objects to the ALJ's second finding of fact which concluded that A.W. was suspended for 17 days during 1987-88 without a formal hearing before the Board. It objects to this finding on the grounds that it implies that a formal hearing was required, which, it claims, as a matter of law, was not required.

The Board further objects to the third finding of fact wherein the ALJ concludes a suspension took place without consultation with the child study team. "We believe that the record and testimony clearly showed that there was consultation with representatives of the Child Study Team and that Vice Principal Abate was advised to treat A.W. in a normal fashion as other students." (Id., at p. 4)

Finally, the Board objects to the ALJ's fourth finding of fact whereby he concludes that the school administrators believe that because A.W. was mainstreamed she was subject to suspension without regard to her disability. The Board suggests this conclusion cannot be inferred from the facts in the record. "Both administrators believed that A.W. was subject to an in-school suspension as a result of consultations by both the Superintendent and Vice Principal Abate with James Bolitsky, Supervisor of Pupil Personnel and Supervisor of the Child Study Teams." (Id., at p. 4)

The Board's legal exceptions first address the ALJ's conclusion that in-school suspension is as severe a discipline as an out-of-school suspension, citing the ALJ's conclusion to that effect

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at page 8 of the initial decision. The Board submits there is no factual or legal basis for this conclusion, providing a lengthy contrast between its understanding of the two conditions. It attaches to its exceptions Exhibit A, part of the 1988-1989 Fall Report/Common Core of Data Survey, submitted by the Board to the Department of Education. It claims the report requires statistics be submitted specifically dealing with out-of-school suspension. "If there was no distinction between in-school suspension and out-of-school suspension, it is submitted that the Department of Education's reporting survey would not make the distinction. The report singles out 'out-of-school suspension' because that type of suspension is significantly different than an in-school suspension such as the one imposed upon A.W. in this matter." (Id., at p. 6) The Board contends that the ALJ's concluding that the two types of suspension are the same results in a number of erroneous legal conclusions also found in the initial decision.

Moreover, the Board avers there is no authority in case law or in N.J.S.A. 18A:37-2 which mandates a formal hearing before the Board or otherwise before imposing an in-school suspension. "The student involved in an in-school suspension is not deprived of the property and liberty rights which the Supreme Court sought to protect in Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975) see specifically 95 S. Ct. 735-737." (Id.) In the alternative, the Board argues that even if Goss were applied to this matter, compliance with Goss has taken place.

> Pursuant to Goss, in connection with a suspension of 10 days or less, a student need only be given an informal hearing before an administrator. There is no requirement of a trial-type procedure before the Board of Education. In this matter, A.W. was advised of the charges against her and she was given an opportunity to explain them and present her version before Vice Principal Abate prior to discipline taking place. This is the type of hearing that is envisioned under Goss. See 95 S. Ct. 738-741. Although the initial decision makes reference to the fact that there were 17 days of in-school suspension in total for the year 1987-88, it is uncontraverted (sic) that the action which is the subject of the present appeal involved an in-school suspension of 10 days or less. It appears that the hearing requirements imposed in Goss apply to a specific incident and are not intended to relate to cumulative suspensions which may have occurred against a single student. (Id.)

In responding to the ALJ's conclusion that the Board failed to comply with the provisions of N.J.A.C. 6:28-2.8, the Board submits that the provisions of that section do not apply to in-school suspensions since the pupil is not being deprived of the opportunity to attend school. Thus, the Board claims, it did not violate N.J.A.C. 6:28. However, states the Board, "the Respondents readily concede that the record is perhaps not as complete as it

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could be in regard to the exact nature of the action taken by the Child Study Team as the Supervisor of the Team and the Special Education Program did not testify." (Id., at p. 7)

In response to the ALJ's conclusion that no authority has been cited to support the system of probation which was involved in this case, the Board cites N.J.S.A. 18A:37-1 which states that students are required to submit to the authority of school rules, and also claims that school officials have the obligation to maintain order and set forth reasonable rules and regulations in the school. "In the present matter, there is no question that A.W.'s parents were clearly advised that A.W. was on probation. A.W.'s discipline record contained a myriad of repeated offenses. The concept of probation is a legitimate one to try to deal with a student who repeatedly violates school established rules. Further, as indicated above, although it may not be clear from the record before the Administrative Law Judge, the concept of probation has been approved by the Respondent Board of Education." (Id.)

The Board further contends there were procedural defects in the initial decision in that it "seems to be based in large part upon A.W.'s classification as a student in need of special education." (Id., at p. 8) The Board avows that the prehearing Order did not address A.W.'s classification specifically. It claims that "[i]f this had been set forth in the prehearing Order as a significant issue, further testimony and evidence would have been presented by the Respondents with regard to it." (Id.) It contends that if this matter is to focus upon A.W.'s classification, it must be remanded for a plenary hearing on that issue. "No complete presentation was made in that regard and it is submitted that none needed to be made in view of the nature of the issues set forth in the prehearing Order." (Id.) The Board further argues that "for a decision in the present matter to be made in part upon alleged wrongful conduct by the Respondents based upon A.W.'s classification is not only incorrect but is unfair in view of the nature of the prehearing Order and the proceedings which took place below." (Id.)

By way of conclusion, the Board contends that the in-school suspension given to A.W. did not violate her due process rights, nor did such suspension give rise to the necessity of a hearing. In the event that a hearing is determined to have been necessary, however, the Board avers one was conducted. "It is the policy of the Respondents to provide a hearing of the nature which took place in the present matter in all cases of in-school suspension. There has been no evidence of any nature whatsoever to show that the action taken against A.W. was selectively enforced against her because of ill will." (Id., at p. 9) Further, the Board concludes that the policy of in-school suspension such as that imposed in the present matter is justifiable and in accordance with the Board's policies. The Board submits that the initial decision should be reversed or, in the alternative, the matter should be remanded for further hearings.

The Board's reply exceptions first address the disciplinary point system in effect in the district and petitioner's allegation that the initial decision does not affirmatively strike down said

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policy as violative of N.J.S.A. 18A:37-2. The Board contends that to strike down the point system is not justified based upon an analysis of the statute. Claiming again that there is a significant difference between an in-school and an out-of-school suspension, the Board avers that the provisions of N.J.S.A. 18A:37-2 "seem to apply to out-of-school suspension and therefore would not be applicable to the present situation." (Board's Reply Exceptions, at p. 1) Further, the Board surmises that petitioner wants a broad policy statement to be made in the present case based upon facts which are not pertinent. Since the instant facts involved an in-school suspension, the Board claims the administrative case should be made upon the facts in this particular matter.

Moreover, the Board contends that even if N.J.S.A. 18A:37-2 were applicable to this matter, "[t]he statute specifically provides that good cause for suspension or expulsion shall include 'but not be limited to' a number of enumerated causes including 'continued and willful disobedience'." (Id., at p. 2) The Board states this would be a basis for any type of suspension and would be authorized by N.J.S.A. 18A:37-2.

In response to petitioner's allegation in exceptions that the initial decision failed to address his argument of ill will and animus, the Board states, "As shown from the recital of testimony contained in the initial decision, there was simply no evidence whatsoever from which a conclusion of ill will or animus could have been made." (Id.) Pertaining to the June 29, 1987 letter (J-12 in evidence) the Board cites the initial decision, ante, for support of its contention that the letter in question was written by the principal of the high school, not by Vice Principal Abate. The Board further avows that said letter was a form letter sent to parents whose students would be on probation. Thus, the Board argues, "it is impossible that any finder of fact could determine ill will on the part of Vice Principal Abate on the basis of the June 29, 1987 letter." (Id., at p. 3)

In response to petitioner's reference to paragraphs 7 through 15 of the verified petition, the Board replies that "[u]nder our system, any party can essentially allege anything they please. However, the allegations must be proven by the party asserting them. At the hearing in this matter, there was no proof whatsoever to support the particular paragraphs referred to and generally, the allegations of ill will." (Id.) Thus, the Board claims, petitioner's exception in this regard is without basis.

Upon his careful and independent review of the record before him, which, it is noted, does not include transcripts of the hearing below, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law for the reasons expressed therein. He adds the following.

The Commissioner notes initially that it is unchallenged that Vice Principal Joseph Abate had knowledge dating from September 1986 that A.W. is classified as perceptually impaired and, thus, is a special education pupil. (See Initial Decision, ante, Finding of Fact No. 4.)

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The Commissioner further notes that while the prehearing Order in this case did not address specifically the import of A.W.'s status as a classified student on the resolution of the case, counsel was aware of her status at the time the Order was drafted and thereby knew or should have known to prepare its case on that issue. The Commissioner so concludes based on paragraph 8 of the prehearing Order concerning "Discovery and Date for Completion" which states:

> 8. DISCOVERY AND DATE FOR COMPLETION:
>
> The Board agrees to provide petitioner with statistical data regarding the suspension of handicapped pupils from regular school attendance for 1986-87 and 1987-88. Petitioner seeks to depose the principal and more likely than not the superintendent. The Board will advise petitioner by Monday, April 11, 1988 whether it consents to such depositions. If no consent, petitioner shall move by letter to compel the taking of depositions for good cause to be shown. (emphasis supplied)
>
> (Prehearing Order, at p. 3)

Based upon these findings, the Commissioner is in accord with the ALJ's conclusion that both the vice principal and the superintendent disregarded the dictates of N.J.A.C. 6:28-2.8 (c) and (d) before disciplining A.W., a handicapped student:

> (c) When an educationally handicapped pupil is suspended, the principal shall forward, at the time of suspension, written notification and description of the reason(s) for such action to the parent(s) with a copy to the child study team.
>
> (d) When the suspension of an educationally handicapped pupil exceeds a total of 10 school days accumulated in a school year, the child study team shall review the status of that pupil in order to:
>
> 1. Determine if the behavior which resulted in the suspension was primarily caused by the pupil's handicapping condition;
>
> 2. Determine if the pupil's individualized education program is appropriate; and
>
> 3. Prepare and forward to the principal and parent(s) a written report with recommendations.

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Notwithstanding the testimony from the vice principal that he spoke with a member of the child study team concerning A.W.'s classified status sometime during 1986 (see Initial Decision, ante), the record is devoid of documentation that he or any other member of the administrative staff complied with the specific dictates of N.J.A.C. 6:28-2.8. Thus, the Commissioner agrees with the conclusion of the ALJ that :

> There is no evidence that Vice Principal Abate ever determined whether A.W.'s alleged offensive behavior which resulted in her accumulation of points was primarily caused by her educational handicap. There is no evidence to show Vice Principal Abate, the child study team, the principal, or the superintendent ever determined whether A.W.'s program meets her educational need with respect to her asserted misconduct. In fact, there is no evidence that school authorities ever considered State Board Rules set forth above regarding a discipline to be imposed upon A.W. [,] an educationally handicapped pupil, to insure that such rules were being followed. Accordingly, all suspensions of A.W. from the regular school program during 1987-88 must be set aside as being improvidently imposed upon her.
> (Initial Decision, ante)

Accordingly, the Commissioner finds the Board's exceptions arguing the reasonableness of its actions in so suspending A.W. to be essentially without merit. Similarly, he dismisses the Board's argument that the matter should be remanded for further findings as to documentation and testimony on whether the child study team or the administration did comport with the requirements of N.J.A.C. 6:28-2.8 in that the Board was on notice at hearing to defend its position in this regard, as stated above.

However, the Commissioner does not agree with the ALJ's determination that the system of probation in effect in respondent's district is unreasonable. (See Initial Decision, ante) Board policies carry a presumption of correctness. See Boult and Harris v. Bd. of Ed. of Passaic, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L 521 (E.&.A. 1948). In the Commissioner's view, the principal's letter (J-12) was intended merely to place the parents on notice -- a form of warning -- that, based upon her past record of conduct, A.W.'s further actions would be scrutinized in relation to such record. On the record before him, the Commissioner therefore has no basis for finding such policy of probation in any way arbitrary. He so finds.

Further, the Commissioner finds no merit in the Board's exception that there is a difference between an in-school and an out-of-school suspension. The Commissioner recognizes that no such distinction exists in law. He concurs with the ALJ's conclusion that both in-school and out-of-school suspensions "includes the temporary cessation of a pupil's right to attend a regular school program," (Initial Decision, ante) Thus, the Commissioner

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dismisses as being without merit the Board's contention that the in-school suspension meted A.W. somehow deserved lesser due process protections. See generally R.R., supra; see also, Goss, supra. In so concluding, the Commissioner has not considered the Board's submission appended to its exceptions, Exhibit A, Fall Report. Such submission was not made a part of the record before it was closed by the ALJ. The Board may not admit to the record through the "back door" what was not raised in due course before the ALJ at hearing. Further, even assuming that such evidence could be admitted, the fact remains that A.W.'s status as a classified pupil was changed by such suspensions with proper consultation with the child study team and without opportunity for the parents to seek due process if they so chose.

As to petitioner's exception that the ALJ failed to comment on ill will or animus toward A.W., the Commissioner determines that the record before him does not support a finding of such ill will. The Commissioner adopts as his own the argument of the Board as found in its reply exceptions at page 3 as follows:

> The Petitioner's exception cites the June 29, 1987 letter addressed to the Petitioner and admitted into evidence as J-12 as a basis by which ill will against Vice Principal Abate should have been established. Further, the Petitioner asserts in his letter of exception that the letter of June 29, 1987 was written by Mr. Abate. This is simply incorrect factually. As indicated in the initial decision (see page 5 of decision), the letter in question was written by the Principal of the high school and not Vice Principal Abate. It was further indicated at the hearing that the letter was essentially a "form" type of letter sent to parents whose students would be on probation.
>
> Based upon the facts that the letter in question was not even written by Mr. Abate and that the letter, in essence, was similar to that sent to all other parents, it is impossible that any finder of fact could determine ill will on the part of Vice Principal Abate on the basis of the June 29, 1987 letter.

The Commissioner also accepts the Board's argument that petitioner's citing the verified Petition of Appeal for proof of ill will is ill-founded. The Commissioner adopts as his own the Board's statement at page 3 of its reply exceptions wherein it states:

> The Petitioner also cites in his letter of exception Paragraphs 7 through 15 of the Verified Petition. Under our system, any party can essentially allege anything they please. However, the allegations must be proven by the party asserting them. At the hearing in this

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matter, there was no proof whatsoever to support the particular paragraphs referred to and generally, the allegations of ill will.

Thus, the Commissioner dismisses petitioner's allegations of ill will and animus for failure to meet his burden of persuasion.

Finally, as to petitioner's argument that the Board's disciplinary point system is violative of N.J.S.A. 18A:37-2, on the limited record before him, the Commissioner finds insufficient basis to determine that such policy is inherently flawed. The Commissioner notes that petitioner only provided his argument in writing on this issue by way of exceptions. The ALJ did hear argument on the issue below and summarized the operation of the system in the initial decision, ante. Petitioner's claim that such policy violates N.J.S.A. 18A:37-2 because the infraction with which A.W. was charged did not "[reach] such a level as to warrant suspension" (Petitioner's Exceptions, at pp. 1-2) is essentially without merit. N.J.S.A. 18A:37-2 is not an inclusive list of offenses for which a student might be suspended or expelled. The Commissioner delegates to the Board the authority to discern what offenses might warrant such action, subject to review by the Commissioner as to the reasonableness of any particular action. N.J.S.A. 18A:11-1 Thus, the Commissioner in the instant matter finds no basis for broadly condemning the instant disciplinary point system, so long as the individual student's due process rights are observed in taking an action to suspend or expel under Goss, supra, and R.R., supra. The Commissioner so finds.

Accordingly, for the reasons expressed in the initial decision as supplemented herein, the suspensions of A.W. from regular school attendance during 1987-88, including the suspension at issue in the instant proceedings which occurred during March 1988 are hereby set aside as being improperly imposed upon her due to her classified status. The Commissioner directs that A.W.'s pupil record be purged of any reference to any in-school suspension imposed upon her during 1987-88. The Commissioner further directs as recommended by the ALJ, ante, that "the Board's child study team *** immediately evaluate the educational status of A.W. and *** develop an appropriate program for her educational need including additional assistance if in its judgment such assistance is warranted."

COMMISSIONER OF EDUCATION

December 2, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1569-88

AGENCY DKT. NO. 26-2/88

ELLEN SPECTOR,

Petitioner,

v.

EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Respondent.

James E. Stahl, Esq., for petitioner (Borrus, Golden, Foley, Vignuolo, Hyman & Stahl)

Martin R. Pachman, Esq., (Pachman & Glickman)

Record Closed: September 9, 1988 Decided: October 24, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Ellen Spector (petitioner), formerly employed by the East Brunswick Township Board of Education (Board) as school librarian at its Memorial elementary school, claims her termination of employment by the Board is arbitrary, capricious, unreasonable and in violation of state law regarding the employment of non-tenured teachers. After the Commissioner of Education transferred the matter on March 11, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was scheduled and conducted May 2, 1988. After one adjournment, the matter was finally heard September 8, 1988 at the Edison Township Municipal Building, Edison Township. The conclusion is reached in this initial decision that petitioner failed to establish a cause of action against the Board and that, therefore, the motion of the Board to dismiss the petition of appeal must be and is granted.

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BACKGROUND FACTS AND ISSUE

I

Petitioner first began employment with the Board during 1984-85 as a substitute teacher. Petitioner was offered and she accepted permanent employment as a school librarian assigned to the Memorial elementary school during March 1986. Her employement for 1986-87 was renewed. During the 1987 spring, petitioner was offered and she accepted continued employment by the Board for the 1987-88 school year. During September 1987, however, the Memorial elementary school principal, Albert Zusman, asked for petitioner's resignation. The Board at a meeting conducted December 3, 1987 accepted the recommendation of Mr. Zusman and of the superintendent of schools that the employment of petitioner be terminated. Accordingly, the Board exercised the 60-day notice of termination clause in the employment contract.

No issue was raised here that petitioner has a tenure status of employment. Rather, the mixed issue of fact and law presented is whether the Board's termination of petitioner's employment during the effective dates of the employment contract is arbitrary, capricious, unreasonable, or in some manner unlawful.

II

Petitioner is a non-tenured teacher. Non-tenured teachers enjoy no guarantee nor affirmative right of continued employment with an employing board of education from one academic year to the next. In short, a non-tenured teacher has a guarantee of employment only for the effective dates of the individual employment contracts entered into with a board. The effective dates of employment under the contract is further contingent upon a notice of termination clause. In this case, the Board exercised its 60-day notice of termination clause and paid petitioner 60 days forward from December 3, 1987.

A non-tenured teacher whose employment is not continued is statutorily entitled to a statement of reasons for the non-reemployment, N.J.S.A. 18A:27-3.2. A non-tenured teacher whose employment is terminated during the term of an employment contract is also entitled to a statement of reasons. While the Board initially resisted

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affording petitioner reasons for its termination of her employment, it complied with an Order to do so. Petitioner was advised that the Board terminated her employment for the following reasons:

1. Petitioner's failure to alter her demeanor within the library in order to foster a positive learning environment and good feeling tone, despite repeated urgings to do so.

2. Petitioner's attempt to interfere with the orderly and efficient scheduling of her building.

3. Petitioner's attempting to usurp the authority of the building principal after he specifically rejected a requested schedule change by attempting to effect that change directly with other staff members.

4. Ordering children not to touch books by using screaming and negative tones.

5. Improper classroom control and discipline.

Administratively, non-tenured teachers whose employment is not renewed or is terminated are entitled to an informal opportunity to be heard by the Board to persuade it that employment should be continued. N.J.A.C. 6:3-1.20(a)(b). Under the policy of the State Board of Education pursuant to its authority at N.J.S.A. 18A:27-3.3, an appeal to the Commissioner under N.J.S.A. 18A:6-9 regading non-reemployment of non-tenured teachers with a termination of employment of non-tenured teachers is in its scope "very limited" and not at all concerned with whether the affected person "is a good teacher by objective criteria." For an appeal to progress to a plenary hearing it must allege facts which, if true, would constitute a violation of constitutional or legislatively conferred rights. Guerriero v. Board of Ed. of Borough of Glen Rock, 1986 SLD —, State Board dkt. no. 26-85 (Feb. 7, 1986), aff'd N.J. App. Div., (Dec. 17, 1986), A-3316-85T6 (unreported).

In Dore v. Bedminster Twp. Board of Ed., 185 N.J. Super. 447 (App. Div. 1982) the Appellate Division held that "absent constitutional constraints or legislation affecting the tenure rights of teachers, local board of education have an almost complete right to terminate the services of a teacher who has no tenure***". At 456.

Petitioner must, of necessity, show by a preponderance of credible evidence that the reasons the Board terminated her employment is in violation of some constitutional or statutorily conferred right she has.

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PETITIONER'S PROOFS

Petitioner's evidence tends to establish that between March 1986 through June 30, 1986 she was not formally observed nor evaluated by the school principal as the school librarian. The principal perceived petitioner to be a nervous individual. He did not want to add to tension he felt she was experiencing being new to the school by formally evaluating her performance. The principal did informally observe petitioner's performance. Nevertheless, an individual improvement plan for 1986-87 was jointly prepared between the principal and petitioner (J-1).

During the 1986-87 year the evidence shows petitioner was observed and evaluated on September 30, 1986 (J-2), January 21, 1987 (J-3), February 27, 1987 (J-4), and on or about March 23, 1987 a summary evaluation (J-5) was prepared by the principal on petitioner's performance. An individual improvement plan for 1987-88 was jointly executed between petitioner and the principal (J-6).

From March 1986 through the end of the 1986-87 academic year the principal's perception of petitioner was that her "feeling tone" left something to be desired. The principal defined "feeling tone" as an entire atmosphere for learning created by the teacher in the classroom and by a certain environment in the classroom for learning. The principal testified that the "feeling tone" includes the voice, physical body action and body language. Furthermore, the principal was concerned that petitioner as a "special" teacher, one who does not have a regular classroom, be very visible to classroom teachers in order to confirm to classroom teachers that special teachers are not being treated with favoritism.

At the beginning of the 1987-88 school year, petitioner reported to the principal's office prior to the return date of all pupils in order to check her schedule. Petitioner inquired of the principal why she had more classes on certain days, no classes on a particular day, and lighter classes on another day. The principal testified he explained to her that she was his "wild card" in terms of providing regular classroom teachers with their contractually-entitled duty-free period. She was the only person he had in the building on a full-time basis who could fill in for the classroom teachers while they were on their breaks. Petitioner indicated that she would like to change her schedule

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and the principal advised that it would be very difficult. Petitioner went ahead and talked with other teachers about changing the schedule so that her schedule would be more attractive to her. Certain teachers became upset and reported back to the principal. The principal was very displeased about petitioner's conduct and her attempts to change the schedule.

Shortly after the incident with the schedule change, the principal testified he was walking past the library one day when he heard petitioner in a loud voice tell a pupil not to touch a particular book. The principal, recalling that he was concerned about her "feeling tone" which includes her body action and her voice, determined that petitioner was simply not fitting in to his idea of what constitutes an elementary school oriented for the pupils. Accordingly, he recommended petitioner's employment be terminated.

The school superintendent, upon learning of the principal's recommendation, insisted that the principal perform on-sight observations and evaluations of her performance on November 20, 23, and 24, 1987. These orders from the superintendent were to justify, in the superintendent's mind, the legality of terminating petitioner's employment.

This concludes a recitation of petitioner's proofs in her effort to establish that the Board acted arbitrary, capricious, unreasonable, or in some manner unlawful regarding the termination of her employment.

DISCUSSION AND CONCLUSION

Considering the background facts of the matter, together with the proofs brought forward by petitioner in the best light possible, leads to the inescapable conclusion that petitioner has failed to state a claim upon which relief could be granted. As noted earlier a non-tenured teacher who appeals his or her non-renewal or termination to the Commissioner under N.J.S.A. 18A:6-9 is entitled to a very limited hearing which is not at all concerned with whether the affected person, here petitioner, is a good teacher by objective criteria. Petitioner's burden in this case is to establish that a constitutional or legislatively conferred right was violated regarding her termination of employment. Petitioner failed in this burden.

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At best, petitioner's evidence shows that the principal became displeased with her performance because of a feeling tone which he discussed with her. The principal cautioned petitioner regarding the level of her voice with pupils. The principal explained to petitioner the necessity for having her class schedule as printed for 1987-88. Petitioner, despite such explanation, attempted to rearrange her schedule. Other teachers became displeased with petitioner's efforts regarding her 1987-88 schedule. The principal became displeased with petitioner.

The Board need not prefer charges against a non-tenured teacher in order to exercise a termination clause in an employment contract. The Board is free to exercise its termination clause so long as a person's employment is not terminated in violation of a constitutional or legislatively conferred right. In this case, the Board exercised the notice of termination clause in the employment contract for the reasons expressed to petitioner through counsel in its letter of September 6, 1988.

For all the foregoing reasons, the petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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OAL DKT. NO. EDU 1569-88

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

October 24, 1988
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

October 25, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 27 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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ELLEN SPECTOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions to the findings and conclusion in the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In the Commissioner's judgment the ALJ properly construed the relevant statutes and case law in finding and concluding that the facts in the record of this matter establish that petitioner failed in her burden of proving that the Board's action in terminating her employment contract violated any constitutional or legislatively conferred right to reinstatement as a school librarian.

Accordingly, the Commissioner adopts as his own those findings and conclusion in the initial decision and hereby grants the Board's Motion to Dismiss the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

December 9, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 5375-86
AND EDU 6295-87
AGENCY DKT. NOS. 250-7/86
AND 273-8/87
(CONSOLIDATED)

MADONNA LEDBETTER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,
Respondent.

Karen L. Jordan, Esq., for petitioner (Greenberg & Prior, attorneys)
Kathleen W. Hofstetter, Esq., for respondent (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: July 8, 1988 Decided: October 24, 1988

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Toms River Regional School District (Board) avers that she was unjustly denied an adjustment and longevity increment during the academic years 1986-87 and 1987-88 for alleged excessive absence from duty. Petitioner alleges that her absences were caused by the unsafe and unhealthy work environment

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provided to her by the Board and contends that the Board's action to impose disciplinary sanctions upon her is unreasonable, arbitrary, capricious and contrary to the avowed purpose of the Public Employees Occupational Safety and Health Act (PEOSHA). The Board denies the allegations and asserts, among other things, that its actions were at all times legal, proper and within its statutory discretion and it provided petitioner with a safe and healthful work place.

PROCEDURAL ASPECTS

Petitioner filed her Petition of Appeal before the Commissioner of Education on or about July 18, 1986, pursuant to N.J.S.A. 18A:6-9. Subsequent to the filing of the Board's Answer and issue having been joined, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) on August 14, 1986 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On October 1, 1986, a prehearing conference was held, followed by a Prehearing Order dated October 2, 1986, wherein the issues to be determined by this administrative tribunal were set forth, as agreed upon by the parties, together with certain stipulation of facts. It was also agreed that the matter would move forward to a hearing January 14 through 16, 1987.

Prior to the hearing, petitioner moved and was granted leave, for good cause shown, to place the instant matter on the OAL inactive list. The matter was placed on the inactive list on January 20, 1987, for a period of six months pending the resolution of a related Worker's Compensation case involving the same parties which was filed by petitioner against the Board.

By way of letter dated May 25, 1987, and during the period of inactivity, the Board gave petitioner notice of its intention to permanently withhold her salary increment for the 1987-88 school year, pursuant to N.J.S.A. 18A:29-14. On or about August 25, 1987, petitioner filed her second Petition of Appeal before the Commissioner challenging the Board's action by way of asserting essentially the same allegations and requested relief which formed the basis of her first and original petition. A subsequent Order of Inactivity was entered by the undersigned on August 31, 1987 pending resolution of the Worker's Compensation matter. Thereafter, on October 2, 1987, an Order was entered by the undersigned to consolidate the two matters.

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On January 6, 1988, the Worker's Compensation case came on for trial. The Worker's Compensation Judge, upon learning of the herein pending matters, placed that case on its inactive list pending the disposition of the two matters before the Commissioner of Education. Therefore, the instant matter was scheduled for hearing on April 25, 1988 and continued on through April 29, 1988 at the Berkeley Township Municipal Court. The parties submitted post-hearing briefs; the last of which was received on July 8, 1988 which constituted the record closing date. Extensions for the execution of this initial decision were requested and granted.

ISSUES

Pursuant to the Prehearing Order dated October 2, 1986, the issues to be determined by this tribunal are as follows:

1. Whether petitioner's absences between October 1985 and February 1986 were caused by unhealthful conditions in the art supply room where she was assigned office space?

2. Whether petitioner's absences since her assignment to the East Dover Elementary School in September 1981 were caused by unhealthful conditions in that school?

3. Whether petitioner's absences prior to assignment to East Dover Elementary School were so excessive that the Board should be permitted to rely upon them to withhold her increment?

4. Whether the Board should be permitted to withhold petitioner for absences caused by unhealthful conditions in the school and art supply room in view of the avowed public purposes of this state to provide a safe working environment for all public employees as set forth in the Public Employees Occupational Safety and Health Act?

5. Whether the Board's action to withhold was arbitrary, capricious and/or unreasonable?

6. Whether the provisions of the Public Employees/ Occupational Safety and Health Act (N.J.S.A. 34:6A-25 et seq.), are applicable to the instant matter and, if so, what provisions does petitioner allege the Board

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violated?

(a) Whether petitioner's claim is barred for failure to pursue the statutory remedies for the alleged violations of the Act?

STIPULATIONS

The Prehearing Order dated October 2, 1986 reflect that the parties stipulate to the following facts:

1. Petitioner is a teaching staff member employed for the requisite number of years required under N.J.S.A. 18A:28-5 to become a tenured teacher.

2. By letter dated April 22, 1986 respondent notified petitioner it would withhold her increment on a permanent basis pursuant to N.J.S.A. 18A:29-14.

3. The reason given for withholding her increment was excessive absences from the 1977-78 school year through the 1985-86 school year.

4. Petitioner was out on maternity leave during the school year of 1981-82.

5. Petitioner was assigned to the East Dover Elementary School when she returned from maternity leave, in September, 1982.

6. Respondent provided petitioner with an office elsewhere in the building rather than the art supply room on or about February 1, 1986.

On April 25, 1988, the first day of hearing, the parties agreed and placed on the record the following stipulations:

7. Petitioner was given proper notice of the April 19, 1986 meeting of the Board.

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8. Petitioner was given timely notice of the Board's action to withhold her salary increments for the 1986-87 school year by letter dated April 22, 1986 which was received by petitioner on the same date.

9. Petitioner was given proper notice of the Board's meeting held on May 19, 1987.

10. Petitioner was given timely notice of the Board's action to withhold her salary increments for the 1987-88 school year by letter dated May 25, 1987 and received by petitioner on the same date.

11. That the collective bargaining agreement between the Board and Teachers Association for the period 1985-88 provided for ten (10) sick leave days per year (pursuant to N.J.S.A. 18A:30-2) and three (3) days personal nonaccumulative leave subject to advance notice.

FINDINGS OF FACT

Based upon a careful review and consideration of the testimony proffered and the exhibits offered into evidence at the hearing, and having given fair weight thereto, I am able to make the following preliminary **FINDINGS OF FACT**:

Petitioner commenced her employment with the Board in or about September 1977 assigned to its High School-South as a reading specialist. She was employed for the subsequent four years, having acquired a tenure status with the Board, when she requested and was granted maternity leave of absence on or about June 1, 1981 and continuing through the 1981-82 academic year. Petitioner returned to duty on or about September 1, 1982 and was assigned to the Board's East Dover Elementary School for the 1982-83 school year. She has continued to be assigned to the East Dover school up to the present.

Petitioner's attendance record during the course of her employment with the Board, excluding the 1987-88 and 1988-89 school years, is summarized as follows:

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School Year	Sick Days	Personal Days	Professional Days	Death	Total
1986-87	29	4			33
1985-86	44	4	1/2		48-1/2
1984-85	21	5	3		29
1983-84	20	6			26
1982-83	21	4	1		26
1981-82	Maternity Leave of Absence				
1980-81	37	4			41
	* Excluding Maternity leave beginning on June 1.				
1979-80	10	3			13
1978-79	8	2	1	3	14
1977-78	12	5			17
Totals	202	37	5-1/2	3	247-1/2

During the course of her employment with the Board, petitioner was "...allowed sick leave with full pay for a minimum of 10 school days in any school year." N.J.S.A. 18A:30-2. Therefore, excluding the school year petitioner was absent from duty for the purpose of maternity leave, she was allowed ninety (90) sick days from September 1977 through June 1987. During that same period, and excluding her maternity leave, petitioner was absent from duty on 202 sick days. This demonstrates that she was absent for 112 sick days more than that allowed by the statute. Considering that the total number of absences equaled 247-1/2 days, excluding her maternity leave, petitioner was absent from duty for the equivalent of one and one-third (1-1/3) school years over a ten year period, when calculated on the base of 180 school days per year. N.J.A.C. 6:27-1.13.

Petitioner's competency, subject matter knowledge and/or teaching skills are not at issue in this matter. The classroom observations and evaluations of her teaching performance demonstrate good ratings in the majority of the categories except that her supervisors comment about her excess absenteeism.

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Petitioner, who is 42 years of age, has been afflicted with allergies since the age of 27. Subsequent to the birth of her daughter in 1981 and while on maternity leave, petitioner commenced treatment with Dr. Yehuda Barsel, a specialist for allergies. Dr. Barsel administered allergy tests to petitioner on November 17, 1981 and subsequently on August 28, 1984. These various tests indicated that petitioner was mildly allergic to corn and yeast. The tests also demonstrated that petitioner was positively allergic to mold, dust, cats, dogs, dust mites, oats, tomato, tea, cola, monosodium glutamate (MSG) and cane sugar.

Petitioner admits to occasional ingestion of those foods to which she has tested allergic, although she attempts to avoid them. Petitioner also admits that there are two cats and one dog in her household. Her home is equipped with an electrostatic dust air filter on the furnace and a central vacuum system vented into the garage. The windows of the home are also sealed closed.

Petitioner was administered desensitization inoculations by Dr. Barsel for her allergic reactions to cats, dogs and dust mites. These treatments commenced in 1981 and were discontinued by petitioner in June 1985.

Upon petitioner's return to the Board's employ from maternity leave, she was assigned as a Remedial Reading Teacher at the East Dover Elementary School. Her teaching duties involved the instruction of certain pupils assigned to meet with petitioner on specific days of the week, every week. Petitioner was assigned to Room 352 for use as her teaching station and her office. Mr. Frank Falcetta was the building principal and petitioner was supervised by him, Ms. Rosemary Butler and Ms. Lynn Brozaitis. The record demonstrates that petitioner was absent from duty a total of 26 days during the 1982-83 school year and 26 days for the 1983-84 school year. Due to the nature of petitioner's instruction, it was not possible for the Board to supply a substitute teacher when petitioner was absent. In the spring of 1984, a conference was held to discuss petitioner's absenteeism and the school administrators' concern about the pupils' loss of instructional time. This conference was attended by petitioner, her union representative, the building principal, her two supervisors and the Board's Curriculum Coordinator. In September 1984, petitioner's position assignment was changed from Remedial Reading Teacher to the Language Arts Reading extension program. Under this assignment, petitioner moved from classroom to classroom instructing groups of pupils in their classroom

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settings rather than assigning pupils to petitioner's teaching station. During the 1984-85 school year, petitioner was absent from duty a total of 29 school days. However, under this new assignment, the Board was able to provide substitute teachers for the continued instruction of pupils when petitioner was absent from duty.

Petitioner continued with this new teaching assignment at the East Dover Elementary School for the 1985-86 school year. In the latter part of October 1985, petitioner's office was moved from Room 352 to the art supply room which also served as an office for two teaching staff members. One teacher had used the art supply room as an office for 18 years while the other teacher had been assigned to the room for ten years. One of the two teachers smoked cigarettes. The art supply room is L-shaped with three foot deep shelves on all of the walls except one wall where a window is located. The shelves hold art supplies which consist of construction paper, crepe paper, glue, paints, aerosol paint cans, chalk, tissue paper, paste, burlap, yarn, wood products, wallpaper sample books, among other things. Petitioners desk was located on an inner wall under a portion of the art supply shelves. Petitioner used this office in the morning before her classroom assignments, after her classroom assignments, a testing period, a conference period and her duty-free lunch period.

Subsequent to her assignment to the art supply room, the record shows that petitioner was absent nine school days out of a possible 17 school days in November 1985; five school days out of a possible 15 school days in December 1985; ten school days out of possible 20 school days in January 1986. Petitioner requested a professional day of absence for December 10, 1985, however, the principal denied her request in writing dated December 9, 1985, where he indicated his reason for the denial was because of petitioner's excessive absences.

On Monday, February 3, 1986, the principal arranged a meeting with petitioner, the vice principal and himself to discuss petitioner's absences. The school administration was concerned that petitioner's absences contributed to a lack of continuity with the language arts program inasmuch as petitioner was assigned to certain pupils on certain days of the week. Petitioner admitted that as of February 3, 1986 she had been absent nine Mondays out of 19 Mondays since school had been in session. Therefore, those pupils assigned to petitioner on Mondays for language

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arts had been denied her personal instruction almost 50 percent of the assigned time. With the approval of the Assistant Superintendent of Schools, it was decided at this February 3, 1986 meeting that on those occasions when petitioner was absent from duty, the assigned substitute teacher would be provided with regular language arts lesson plans rather than alternate substitute teaching plans.

At this meeting held on February 3, 1986, petitioner asserted that the dust in the art store room, which served as petitioner's office, was affecting her allergies which contributed to her absences from school. While no decision to move petitioner out of the art supply room was made at this meeting, shortly thereafter the principal caused petitioner's office to be moved to another location in the school building. The principal asserted that he based the decision to move petitioner from the art supply room on two considerations. The first basis was petitioner's allergic reaction to dust in the art supply room; the second factor was what the principal perceived to be a form of friction between petitioner and the two teachers who were assigned office space in the art supply room for 18 years and ten years respectively.

Petitioner admitted that during the school days she was assigned to the art supply room between the latter part of October 1985 through the first of February 1986 she spent a great portion of her work time and her duty free lunch period in the room. There were other locations in the school building in which petitioner could have worked and spent her lunch break, however, she elected to remain in the art supply room. At no time did petitioner mention to the other two teaching staff members who shared the room with petitioner, that the room caused her to be ill.

On March 20, 1986, the Assistant Superintendent sent petitioner a letter requesting that she meet with him and the building principal on March 24, 1986. Petitioner was advised that she could have a union representative accompany her to the meeting. The meeting was held as scheduled with petitioner, her union representative, the Assistant Superintendent and the building principal. The Assistant Superintendent had reviewed petitioner's absences with the Superintendent of Schools prior to the March 26, 1986 meeting. It was at this meeting that the Assistant Superintendent advised petitioner that he was giving

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petitioner notice of his recommendation to the Board to withhold her salary increment for the 1986-87 school year and the reasons for the recommendation.

It was at this March 26, 1986 meeting where petitioner asserted to the Assistant Superintendent that it was the work place which was the cause of her illnesses and absenteeism. The Assistant Superintendent inquired as to whether petitioner had filed a Worker's Compensation claim; to which petitioner responded that she had not. Thereafter, the Assistant Superintendent and the Superintendent recommended to the Board that petitioner's salary and longevity increments be withheld for the 1986-87 school year. By way of letter dated April 22, 1986, the Board notified petitioner of its action to withhold her entire increment on a permanent basis pursuant to N.J.S.A. 18A:29-14.

Petitioner admitted that subsequent to her move from the art supply room she was absent from duty an additional 15 days for the remaining four months in the 1985-86 school year. Some six months after petitioner had been transferred from the art supply room and three months subsequent to the Board's action to withhold her increment, petitioner filed her Worker's Compensation claim against the Board. For the 1986-87 school year, petitioner was absent 29 sick days and four personal days for a total of 33 days.

Petitioner's assertions that she advised the building principal on December 9, 1985 followed by a Speed Memo on December 13, 1985 that the unhealthful environment of the art supply room was the cause of her illness and absenteeism is rejected here. There was no record nor corroborating evidence to support these assertions. Rather, both claims were contradicted and denied by the principal and his secretary.

Similarly, while there were a number of recorded Monday-Friday absences taken by petitioner, it was not statistically significant to conclude that petitioner's absences were for the purpose of long week-ends or taken before and after a school holiday. An analysis of the pattern of petitioner's absences for selected years 1983-84, 1984-85 and 1985-86 demonstrates the following: In the 1983-84 school year, petitioner was absent for illness four Mondays and eight Fridays while absent eight days Tuesday through Thursday. In 1984-85, petitioner was absent due to illness five Mondays and four Fridays while absent 12 days Tuesday through Thursday. During

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the 1985-86 school year, petitioner was absent nine days for each of the work weekdays except Tuesday where she was absent eight duty days. Although the incident of Monday-Friday absence was greater, it was not significantly so when compared with the total pattern of petitioner's absences.

This concludes the recital of my preliminary **FINDINGS OF FACT**.

FINDINGS OF FACT WITH REGARD TO THE AIR QUALITY OF THE ART SUPPLY ROOM

Petitioner alleges, among other things, that the unhealthful conditions in the art supply room, to which she was assigned office space between the latter part of October 1985 through January 1986, caused her to be ill and absent from duty and which formed the basis for the Board's action to withhold her 1986-87 salary increments. In support of this allegation, petitioner employed an expert in air quality to perform tests at the East Dover Elementary School. The Board also employed experts in the field of air quality and heating, ventilation and air-conditioning (HVAC) systems. The following is a summary of the evidence and my **FINDINGS OF FACT**:

Mr. Arthur Roger Greenway was qualified as an expert in air quality and testified on petitioner's behalf. He was commissioned to assess the quality of air in the art supply room and determined that a measurement of the carbon dioxide level was the most appropriate first step to take. This determination was based, in part, upon the New Jersey Department of Health "Indoor Air Quality Fact Sheet" which states, in part, as follows:

> There is some evidence to suggest that elevated levels of carbon dioxide, a byproduct of human respiration, are indicative of an inadequate supply of fresh outdoor air. A level of 600 parts per million (ppm) or more has been found by some investigators to be associated with widespread complaints. It shows a buildup above outside levels (which usually range form 250 to 350 PPM). Late afternoon indoor carbon dioxide readings are sometimes compared to concentrations present in the morning or present outside in an effort to assess whether contaminants build up during the course of the work day.
>
> In indoor environments, assessing rates of fresh air

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> supply may be the most definitive measurement in investigating complaints. It is usually necessary to utilize the services of a ventilation engineer to review the design of the system and to measure its functioning capacity (P-9).

Mr. Greenway testified that he used a Mine Safety Appliance (MSA) as the device to test the carbon dioxide level in the art supply room. However, in his report to petitioner's attorney, he stated that he used the Drager air sampling tubes for the test. There was testimony by the Board's air quality expert that there is a major difference in the two devices and that the preparation for the two is significantly different. The use of the devices involves a method of drawing air through manual pumps with absorbent tubes which react to the presence of a contaminant in the air by a change of color of the tubes.

Although Mr. Greenway executed a report and testified as to the results of the air qualify assessment, he neither performed the tests nor was present on location when the tests were administered. Rather, the tests were conducted by an employee, John Checchio, who was not present at the hearing to be examined by counsel or this tribunal as to his conduct and performance of the tests. The tests were administered a year after petitioner's occupancy of the art supply room.

Mr. Greenway testified he instructed Mr. Checchio on the method of using the MSA. Greenway did not know whether Checchio, an employee of approximately four months, had ever used a MSA prior to the day, December 18, 1986, Checchio performed the tests. The time of day the tests were performed is not set forth other than "late in the afternoon."

Mr. Greenway's written report states, among other things, that the air was tested in the art supply room (room #1) and the Faculty Office (room #2) in which the carbon dioxide levels ranged from 1,500 parts per million (ppm) to 800 ppm respectively (P-13). The acceptable upper limits of the existence of carbon dioxide in an interior work place is 600 ppm as established by the New Jersey Department of Health guidelines. He asserted that carbon dioxide concentration of outside air is generally between 200 and 400 ppm.

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Greenway's report also states, "The heat source for each room is designed to supply heat only, with no air circulation capabilities" (P-13). There is no basis in fact for this statement. As Greenway testified, the tests were administered by Checchio "late in the afternoon" when, presumably, there was no one assigned to the room and the heat was turned off to conserve energy. In addition, Checchio came to his conclusion only upon a visual inspection of the heating/ventilation unit (HV), without more. There is no showing that Checchio made any inquiry as to the operation of the HV nor did he physically inspect the mechanism. The HV is known as a Nesbit Unit, to which Greenway testified that all Nesbit Units have the capacity to circulate air. Petitioner does not dispute that the blower on the Nesbit Unit turns on and off intermittently throughout the day and does not run continuously.

Mr. Pravin H. Patel was qualified as an expert in civil engineering and testified on the Board's behalf with respect to the Nesbit HV unit. The technical aspects of the equipment is not relevant here other than that it was, at one time, the standard unit used in schoolhouse construction in the United States. Its operation is by way of placement on the outside wall of a building with an exterior wall grill attached to the unit to introduce fresh air or air from outside of the room. A heating coil is on the interior of the unit with a fan which forces fresh air, heated air or a combination thereof into the room. Patel was not able to inspect the interior of the Nesbit Unit in the art room because it was locked. However, he subsequently contacted a member of the Board's maintenance staff, Robert Gallager, who regularly maintains the unit. Galleger reported to Patel that the unit was properly set, clean and functioning without any obstructions to interfere with its operation.

Mr. William Bruce Rossnagel was qualified as an expert in air quality at the hearing and testified on behalf of the Board. Rossnagel personally conducted his air quality tests of the art supply room and the faculty room on January 7, 1987 at 3:20 p.m. Although Rossnagel and Checchio agreed as to the normal and acceptable relative humidity levels in the area tested, they disagreed dramatically with respect to the levels of carbon dioxide. Rossnagel's expert report to which he testified shows, among other things, the results of his tests for carbon dioxide on January 7, 1987 as follows:

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Time p.m.	Location	CO_2 ppm V	Remarks
3:20	Art Supply	200	Heater on
3:40	Hall Outside Art Supply	200	
3:55	Ms. Butterworth Office	200	....
4:10	Faculty Office	200	
4:30	Hall Outside Faculty Office	200	
4:45	Art Supply	300	Taken after heater off 60 minutes (R-23, Table II)

In his subsequent report to counsel for the Board dated March 16, 1988, Rossnagel stated, in part, in his Final Conclusion that:

> While waiting in the Art Supply Room for the 1 hour delay before making the final CO_2 test, the writer looked at and touched every bottle, container, box, paper and cardboard pile, etc. on the shelves in the room. There were no hazardous or odoriferous or offensive compounds. That room was not dusty beyond what a normal art supply room or art classroom would be expected to be. In fact, the writer thought the room was very neat and quite clean. The writer looked in the places where mold or mildew would be expected. There was none. Neither did he spot any dust mites (R-24).

Finally, both Rossnagel and Greenway agree that the 600 ppm level for carbon dioxide is a guideline only and that the only rule or regulation with respect to the amount of carbon dioxide in the air is that by Occupational, Safety and Health Administration (OSHA) which provides for a maximum of 5,000 ppm.

Petitioner produced no evidence to show that other teaching staff members who worked in the East Dover Elementary School were caused to be ill and absent from duty as a consequence of the buildings environment. Nor did petitioner

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produce any evidence that others assigned to the art supply room had suffered any ill effects of working in that assigned area. The facts demonstrate the contrary; i.e., two teaching staff members have used the room extensively for 18 years and ten years respectively.

Having carefully considered all of the relevant evidence with respect to this issue, I **FIND** and **CONCLUDE** that petitioner has failed to carry her burden of proof, by a preponderance of the credible evidence, that the Board's East Dover Elementary School art supply room was unhealthful.

PETITIONER'S MEDICAL TREATMENT

The herein record demonstrates that petitioner became aware that she was allergic to a variety of items approximately 15 years ago. She commenced treatment for her allergies with Dr. Yehuda Barsel in 1981, after the birth of her daughter and prior to her return to the Board's employ for the 1982-83 school year. The record also discloses that during the time petitioner was assigned to the Board's high school and prior to the period she was assigned to the East Dover Elementary School, she averaged 16.75 sick days of absence per year between the 1977-78 school year and ending June 30, 1981. Petitioner was absent 67 sick days in those four academic years. Therefore, petitioner exceeded her statutory allotment of ten sick leave days per year by 17 days of absence during this four year period prior to her transfer and assignment to the East Dover Elementary School. For the next three school years, 1980-81 through 1982-83, petitioner was absent due to illness for a total of 62 days or, an average of 20.66 sick days per year. This three year period included the time petitioner was assigned to the East Dover Elementary School but prior to her assignment to its art supply room. During this three year period, petitioner exceeded her statutory allotted sick leave days by 32 days of absence.

Barbara Michalak-Reilly, D.O., qualified as a doctor of osteopathic medicine and petitioner's treating physician, testified on petitioner's behalf. Dr. Reilly first saw petitioner on December 2, 1985, approximately one month after petitioner had been assigned to the East Dover art supply room. Dr. Reilly testified that petitioner appeared to have a cold and bronchitic cough. The doctor prescribed the antibiotic, erythromycin. Petitioner again visited Dr. Reilly on January 29, 1986 with shortness

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of breath and chest congestion. Petitioner believed her condition was due to her allergies and described the art supply room to the doctor. Dr. Reilly asserted that petitioner suffered from an acute asthmatic attack on January 29, 1986, rather than chronic bronchitis. Petitioner's asthmatic attack was relieved by the administration of epinophrine. On March 22, 1986, Dr. Reilly examined petitioner and noted that petitioner was "...found free of infections or physical defect. She should have no problem completing her professional duties." (P-6).

Dr. Reilly saw petitioner again on April 12, 1986, for a refill of the prescription, Alupent. Because petitioner was experiencing expiratory wheezing, the doctor ordered a chest x-ray to be performed. Reilly maintained that a person with expiratory wheezes either suffers with chronic obstructive pulmonary disease or asthma. The x-ray administered to petitioner at this time did not show or indicate obstructive pulmonary disease. Dr. Reilly asserted that a person suffering with asthma would respond to bronchiodilators. Dr. Reilly placed petitioner on Theophylline which is a bronchiodilator.

On the same day, April 12, 1986, Dr. Reilly wrote the following letter:

> TO WHOM IT MAY CONCERN:
>
> It is my medical opinion based on treatments to Mrs. Madonna Ledbetter that her absences from work from November 1, 1985 until February 1, 1986 were directly caused and/or aggravated by her exposure to the unhealthy environment of her ART STORAGE ROOM OFFICE.

Petitioner subsequently visited Dr. Reilly on April 19, 1986 when petitioner had a runny nose. An appointment was arranged for the following May 3, 1986, for the doctor to check petitioner's theophylline level. On May 3, 1986, petitioner was still suffering from a cold and her theophylline level was assessed and found to be within the acceptable range.

Dr. Reilly saw petitioner on May 21, 1986, where it indicates on petitioner's payment receipt that, "Supraventriculiar tachycardia, asthma improved." An appointment was made and kept for May 24, 1986, at which Dr. Reilly testified that petitioner's asthma was improved with no signs of wheezing. The purpose of this

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appointment was for the doctor to check petitioner for any side effects of the prescription medication for asthma and to control the appropriate level to reduce or eliminate adverse reactions to the medication. Petitioner next visited Dr. Reilly on May 31 and June 7, 1986, the purposes of which were to check petitioner's tachychardi and blood pressure to ascertain that both were under control.

Dr. Reilly continued to treat petitioner. On June 26, 1986, Dr. Reilly wrote a letter, presumably addressed to the Board or its agents, where she stated that petitioner had been under Reilly's care since December 1985 when petitioner was treated for bronchitis. The letter continued to state that on January 29, 1986, Dr. Reilly had treated petitioner for asthmatic bronchitis and that petitioner had informed Reilly of petitioner's move "into a dusty storage room." (R-19). Dr. Reilly continued to state that she treated petitioner with the drug epinephrine to clear the wheeze and that Reilly prescribed the antiasthmatic medication, theophylline, for petitioner's bronchial cough (R-19). Dr. Reilly then continues to describe the stimuli which may trigger an asthmatic attack in a susceptible individual stating, in part, that, "If a particular allergen has been pinpointed, every effort should be made to avoid contact with it." (R-19). Dr. Reilly's letter ends by her stating, "the patient is a known asthmatic. Her condition is allergy to dust but her symptom, asthma took place only when exposed to the known allergen." (R-19).

On October 13, 1986, Dr. Reilly caused a pulmonary function test to be administered to petitioner to determine whether petitioner suffered from permanent pulmonary obstruction. Dr. Reilly did not perform the test, however, it was her opinion that petitioner had permanent pulmonary obstruction. In her report to petitioner's counsel, dated November 12, 1986, Dr. Reilly said, in part, that:

> Ms. Ledbetter had a pulmonary function test performed on 10-13-86. The test indicated mild expiratory obstruction prior to bronchiodilator therapy, Ms. Ledbetter's lungs were free of wheeze at the time of the test. She responded well to bronchiodilator therapy. It is my medical opinion that Ms. Ledbetter has suffered permanent injury to her respiratory system and the injury to her respiratory system and the injury may progress if asthma attacks are continuously provoked.
>
> Although many people have the mistaken notion that asthma is an emotional disorder, this does not appear to be

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> true. However, asthma (like any chronic disease) can produce emotional problems as was seen in this case. These problems may involve the patient's family as well as the patient herself. Emotional support is needed as well as continued medical monitoring (R-20).

Petitioner's medical expert, David J. Scott, M.D., examined petitioner on October 7, 1986, where he took petitioner's medical history, conducted a physical examination, had a chest x-ray taken, an EKG and pulmonary function test performed. It was Dr. Scott's opinion that the only demonstrable objective abnormality as a result of his physical examination was petitioner's obesity. His conclusion with respect to the chest x-ray, blood tests and EKG were all normal. He further concluded that the pulmonary function test, which he administered, showed no evidence of disease or abnormality and was normal. Dr. Scott testified that certain acute pulmonary diseases are readily observed on a chest x-ray while others are not. He asserted, however, that any chronic pulmonary disease would always be evident on an x-ray. It was his opinion that petitioner had no disease, disability or abnormality that was objectively demonstrable. After reviewing some 23 different items, some of which were additional information, Dr. Scott's opinion remained the same where he stated, in part, that:

> ...my conclusion was the same, inasmuch as there was still no demonstrable objective evidence of asthma, and I further stated that there was no scientific basis to assume that the patient's symptomology was anymore related to the inhalation of materials in the art room that may have been contaminated with various items than to assume that her symptoms were related to a bacon, lettuce and tomato sandwich with a coke. (Transcript, April 29, 1988, pp. 80-81).

Dr. Scott asserted that petitioner merely suffered from an upper respiratory tract infection or chest cold, which was not a chronic illness.

Having carefully considered the expert medical testimony and exhibits in evidence, I **FIND** and **CONCLUDE** that petitioner has failed to carry her burden, by a preponderance of the credible evidence, to demonstrate that she suffers from a chronic permanent pulmonary disease. This is so because the Board's medical expert successfully rebutted petitioner's assertions by way of credible testimonial and

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documentary evidence. *Close v. Kordulack*, 44 N.J. 589 (1965); *Jackson v. Concord Co.*, 54 N.J. 113 (1969); *Garden State Farms v. Mathis*, 61 N.J. 406 (1972).

DISCUSSION AND CONCLUSIONS

The facts in this matter clearly demonstrate that petitioner has had, and continues to have, an absenteeism record far in excess of the allowable limits as provided by statute. N.J.S.A. 18A:30-2. Petitioner's absences was not occasioned by one isolated extended illness, which might be excused, but rather, involves a pattern covering her entire employment with the Board. As the Commissioner said in the matter of *Elizabeth Gilchrist v. Bd. of Ed. of the Twp. of Livingston*, 1959-60 S.L.D. 90, aff'd. State Board of Education 1961-62 S.L.D. 203,

> ...Recurrent absences of the kind indicated in this case can be more disruptive to the continuity of school work than one extended absence over a prolonged period of time.... . (Id. p. 95).

Here, petitioner's absence from duty averaged 22.44 days per year for the nine years of her employment. The basic issue, therefore, is whether the Board abused its authority by withholding petitioner's increments for the 1986-87 and 1987-88 school years.

The controlling statute, N.J.S.A. 18A:29-14 provides that a board of education may withhold the employment or adjustment increment, or both, for inefficiency or other good cause. The determination to withhold an increment from an employee is a matter of essential managerial prerogative which has been delegated to the local board of education by the Legislature. *Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Assoc.*, 79 N.J. 311, 321 (1971). Upon his review, the Commissioner of Education is constrained from substituting his judgment for that of the local board. The Commissioner's scope of review is limited to assuring that there is a reasonable basis for the local board's decision. The Commissioner may not upset the local board's exercise of its discretionary powers unless it is found to be patently arbitrary and without a rational basis or, induced by improper motives. *Kopera v. West Orange Bd. of Ed.*, 60 N.J. Super. 288 (App. Div. 1960).

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The herein record demonstrates that the Board's school administrators made petitioner aware of their concerns with regard to her excessive absenteeism. This concern was expressed to petitioner upon her return from her maternity leave of absence, to which she admits and which occasioned her transfer from the Board's high school to its East Dover Elementary School. Therefore, petitioner was made aware of this "inefficiency" and was provided an opportunity to correct it. In *Gilchrist*, supra the Commissioner said:

> ...In dealing with such cases [excessive absenteeism], a board has a dual obligation. On the one hand, it has the obligation to be patient and to show consideration and kindness and, on the other hand, it must ever be mindful of its obligation to maintain the efficiency of school work. Eventually the latter obligation becomes paramount. At what time this obligation becomes paramount is a matter of the board's judgment, honestly and fairly exercised... (Id. at 94).

In the instant matter, the Board was patient for six academic years. Where there was no demonstrable improvement on petitioner's part, the Board exercised its "paramount obligation," "honestly and fairly" *Gilchrist*.

The evidence demonstrates and I so **CONCLUDE** that petitioner had a pre-existing medical problem long before her transfer to the East Dover Elementary School and prior to her assignment to its art supply room.

I **CONCLUDE**, therefore, that the Board did not abuse its discretionary authority to withhold petitioner's salary and longevity increments for the 1986-87 and 1987-88 school year. I also **CONCLUDE** that the Board's action to so withhold was neither arbitrary, capricious nor unreasonable.

Having previously found that petitioner failed to carry her burden of proof with respect to her allegation of an unhealthful workplace, there is no need to address the issue as to whether or not N.J.S.A. 34:6A-25 et seq. is applicable to the instant matter.

Accordingly, for the reasons set forth hereinbefore, it is **ORDERED** that the herein concolidated Petitions of Appeal be and are hereby **DISMISSED**.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

24 October 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

11/26/88
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

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MADONNA LEDBETTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-18.4 and are incorporated by reference herein together with the arguments from post-hearing briefs cited in the exceptions and reply.

Petitioner excepts to the findings and conclusions expressed by the ALJ upholding the Board's action to withhold her 1986-87 and 1987-88 increments and that she did not bear the burden of proof that unhealthful working conditions caused her illnesses. Moreover, she urges that the Commissioner defer his final decision in the matter until the determination of the Division of Workers' Compensation on the issue of whether plaintiff's injury arose out of and in the course of her employment. Petitioner also argues, inter alia, that the ALJ did not address evidence at hearing on the issue of the amount of the increment withholding and the nature of the increment withheld as set forth in her post-hearing brief.

Upon review of the record of this matter, the Commissioner is in full agreement with the ALJ that petitioner has not borne her burden of proof that the Board's action in withholding her increments was arbitrary or unreasonable. The record more than amply supports that petitioner's absences were chronic and excessive. As correctly noted by the ALJ, excessive absenteeism, even when caused by legitimate illness may be the basis for the withholding of salary increments. Gilchrist, supra; Angelucci et al. v. Board of Education of West Orange, 1980 S.L.D. 1066, aff'd State Board 1981 S.L.D. 1386; Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd N.J. Superior Court 1980 S.L.D. 1539, cert. den. 84 N.J. 469 (1980). The record is clear that petitioner's absences were a long-standing and continuing concern of the administration. As noted in a prior decision emanating from the respondent district in this matter in which the Board and its administrators were criticized by the Commissioner for failing to take timely action to address excessive absenteeism, boards of education must confront and counter deplorable attendance patterns as has been done in this case.

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As to the issue of the nature and amount of the increment withholding, the notifications sent to petitioner (J-1 and J-2) are clear that no salary increment was to be given. While the Board's language in its April 1986 resolution (R-8) could have been more precise, its meaning may be readily discerned that petitioner was not to receive an increase in her salary. However, the Commissioner does caution that while an increment withholding is permanent if a future Board does not act to restore the denied increment in subsequent years, this would not preclude a successor Board from acting to restore the increments in future years. See State Board's decisions in Angela Cordasco v. Board of Education of East Orange, 1984 S.L.D. 1201, aff'd N.J. Superior Court, Appellate Division 1985 S.L.D. _____ (decided November 22, 1985); and In re Burns, School District of Newark, October 24, 1984 for discussion on the permanent nature of denied increments derived from the New Jersey Supreme Court decision in North Plainfield Ed. Assoc. v. Board of Education of North Plainfield, 96 N.J. 587 (1984). Notwithstanding the above, the Commissioner does not accept the ALJ's findings and conclusions on the issue of work-related illness. While the ALJ may well be correct in his determinations with respect to the issue, pursuant to the Court's decision in Forgash v. Lower Camden County School District, 208 N.J. Super. 461 (App. Div. 1985) and in keeping with advice received from the Office of the Attorney General, determinations on occupational illness claims are the primary jurisdiction of the Division of Workers' Compensation.

Lastly, while the Commissioner agrees that a Friday-Monday pattern per se was not demonstrated in this matter given the high absenteeism overall, it must be emphasized that a board of education is not required to engage in sophisticated statistical analyses to discern if a Friday-Monday pattern exists.

Accordingly, the ALJ's recommended decision dismissing the Petition of Appeal is adopted by the Commissioner except as noted above. Jurisdiction is not retained for even if a determination of work-related illness is reached by the Division of Workers' Compensation, it will not alter the conclusion that the Board had a reasonable, rational basis to deny petitioner's salary increments since increments may be withheld even when absences are caused by legitimate illness because of the impact such absences have upon the continuity of instruction and the quality of services rendered.

COMMISSIONER OF EDUCATION

December 12, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4295-88
AGENCY DKT. NO. 112-4/88

TRENTON BOARD OF EDUCATION,
Petitioner,
v.
ANTHONY MARION,
Respondent.

Gregory Johnson, Esq., for petitioner (Lemuel H. Blackburn)

Thomas P. Foy, Esq., for respondent

Record Closed: October 19, 1988 Decided: October 31, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

On April 26, 1988 the Board of Fducation of the City of Trenton (Board) certified four charges of conduct unbecoming to the Commissioner of Education for determination against Anthony Marion, a custodian with a tenure status in its employ. After the Commissioner of Education transferred the matter on June 14, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted by Administrative Law Judge Cummis who set the matter down for plenary hearing for October 18, 19, and 21, 1988. Judge Cummis did not hear the matter; he arranged to have the matter transferred to this judge. The hearing began and was concluded October 18, 1988. On October 14, 1988 Thomas P. Foy telephoned his and his client's intended non-appearance at the plenary hearing held October 18 on behalf of respondent. Neither respondent nor counsel for

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respondent appeared at the hearing. This initial decision concludes that because the charges of unbecoming conduct against Anthony Marion were proven to be true the appropriate discipline is termination from his tenured employment with the Board as of April 26, 1988, the date the Board certified the charges.

CHARGE 1

That on or about August 8, 1987 Mr. Albert Williams, Principal at Junior High School Number One, was informed that Mr. Marion approached Mary Shepard and Rosell Jones of the Light-Cleaning Staff and made sexually harassing and insulting remarks. Mr. Williams convened a meeting with Mr. Marion, Ms. Jones and Ms. Shepard where Mr. Marion admitted making certain statements with sexual connotations and apologized. Mr. Marion promised to stop making sexually insulting remarks to female custodians.

CHARGE 2

That during the 1986-87 and 1987-88 school years, Mr. Marion repeatedly approached teaching staff members at Junior High School Number One making sexually harassing and insulting remarks. Mr. Marion repeated his misconduct despite the earlier warning of Mr. Williams.

CHARGE 3

That on February 11, 1988 Mr. Williams was informed that Mr. Marion allegedly approached L.K., a special education student, on several occasions during the 1987-88 school year and made sexually harassing remarks and in one incident engaged in unwarranted physical contact. Subsequently, Mr. Williams held a conference with L.K., Ms. K., parent, Jacquelyn Geary, special education teacher, Kristine Krzeminski, teacher, Mr. Marion, Mr. Pucciatti and Mr. Carabelli, union representatives. It was agreed at the meeting that Mr. Marion would be transferred to a new location in order to prevent any future contact between Mr. Marion and L. Mr. Williams subsequently notified the Office of the Superintendent of Schools regarding the alleged misconduct of Mr. Marion and on March 1, 1988 Mr. Marion was suspended pending an investigation of this matter.

CHARGE 4

As a result of the aforementioned behavior, respondent, Anthony Marion is hereby charged with misbehavior, insubordination and unfitness to hold the position of Assistant Custodian. Attached hereto is a statement of evidence under oath pursuant to N.J.S.A. 18A:6-11.

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The proofs submitted by the Board in support of the charges shall be considered in their entirety.

PROOFS IN SUPPORT OF CHARGES

Albert Williams, the principal of Junior High School Number One where respondent was assigned as custodian, testified that he received complaints from the head custodian and one or two teachers during August 1987 regarding the conduct of respondent. The complaints had to do with respondent's unwelcomed comments, sexual in nature, to teachers. Respondent apologized for his conduct and promised not to engage in such conduct in the future.

Mary Shepard who is a member of the Board's Light Cleaning Staff testified that during the 1987 summer while on duty respondent told the "ladies" including herself to clean elsewhere. The ladies resisted that directive from respondent; he cursed; she told respondent to stop cursing; respondent complains to principal Williams; and a meeting occurred during August 1987.

During February 1988 respondent approached Ms. Shepard and made unwelcome comments to her. Ms. Shepard memorialized the event in writing (P-3) as follows:

> I was standing in Room number 8, next to Room number 18, and Mr. Marion came in. I was oiling my mop at the time. He said, "Mary, I would like to make you high and do something to you." I said, "Are you talking to me?" He replied, "I would like to make you high." I said, "Excuse me. I give you respect, and I expect for you to give me respect. And, furthermore, you can go to hell"' After telling the other ladies, he came in a few days later and apologized.

L.K., presently 14 years of age, is a pupil in the Board's Junior High School Number One. L.K. testified that the following statement she submitted regarding respondent is truthful and accurate:

> I was at the Girl's entrance, downstairs, at about 2:25 p.m. Mr. Marvin Jones, and A.G., left. I was standing by myself. The janitor (Mr. Marion) walked around the van that was parked there. He walked up and said, "You're so pretty that I could love you." Then he asked me if I was going to the basketball practice. I said,

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> "Yes." Then he said, "I'll see you there." And then he went up the stairs, turned around and said, "You're so pretty. I could just hug you and love you."
>
> This was the day that Ms. Williams and Ms. Robinson were selling cupcakes. I went down with them, and sat with them. I was about to tell them when the janitor walked around the corner, so I went to another subject. Then he left, and then, about 20 minutes later, I told them what happened. Mr. Jones said that he was going to talk to the janitor, and then I left, and went home, and told my mother.
>
> After Christmas, the janitor told me that I didn't look like a student, I looked like a teacher. He says that all the time, whenever he sees me.
> (P-4)

Ms. Sue Wright, a teacher of special education who knows respondent, testified that in or about September or October of 1986 respondent made unwanted comments to her. Ms. Wright testified that while she consciously suppresses much of what respondent uttered to her because she found his comments generally offensive, she recalls respondent saying to her in front of her pupils "Boy, do you look sexy." Marilyn Tucker, a teacher of English, testified that respondent on several occasions would say to her during the cold weather "I have several ways to warm you up" or "For a couple of dollars I'll warm you up". Diane Frascella, a techer of art, testified that respondent would always say to her "don't you look nice" or "your hair looks nice" or " you smell nice." Occasionally, Ms. Frascella testified that the respondent would in fact put his nose on her neck and sniff her neck and then tell her she smelled nice. Finally, Ms. Frascella testified that from time to time he would ask her to go to lunch with him which she refused on all occasions. Elizabeth Jones testified that during the fall of 1987 respondent would utter comments to her such as he likes to watch her "behind" as she walked away. Kathleen Crouch, a teacher of science, testified that during January 1987 she was planning her wedding. Respondent would approach her and constantly ask her if she was sure she wanted to get married because he wanted to take her to a desert island, get her drunk, and have his way with her. During January of 1988, Ms. Crouch testified that she had to have a cast on one of her legs. Respondent would remark that he would rub her leg and kiss it to make it better. Ms. Crouch found repulsive such unwelcome comments to her. Doris Williams, a security officer at the school, testified that during February 1988 L.K. reported to her that respondent was following her and making comments to her. Donald Wollman testified that he attended a meeting during February 1988 with respondent shortly after L.K. complained regarding respondent's conduct and word to her. At the meeting, Mr. Wollman

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testified that respondent admitted asking females to lunch; he admitted being a "womanizer"; and, respondent expressed concern only over being called a child molester.

This concludes a recitation of the proofs submitted by the Board in support of the charges against respondent.

FINDINGS OF FACT

A preponderance of the credible evidence brought forward by the Board in this matter shows that respondent did make remarks to Ms. Shepard which she found insulting and which she found to be of a sexual nature. It is not unreasonable for Ms. Shepard to view respondent's remarks that he wanted to get her high in a sexual context. Absent evidence to the conrary from respondent, I **FIND** his remarks to have been insulting to Ms. Shepard and to contain sexual connotations.

I **FIND** that the proofs submitted by the Board establish that during the 1986-87 and 1987-88 school years respondent approached teaching staff members and made comments to them which were found to be sexually harassing and insulting. Accordingly, charge 2 is found to be true.

I am persuaded by a preponderance of credible evidence as shown by the written statement of L.K. and the testimony of security officer Doris Williams that respondent made comments to L.K. which were perceived by L.K. as sexually harassing remarks. There is no evidence that respondent ever engaged in unwarranted physical contact with L.K.

With respect to charge 4, it is noted that charge 4 does not allege separate independent conduct. Rather, charge 4 is a summary of charges 1, 2, and 3.

CONCLUSION AND DISCIPLINE

Respondent has acquired a tenure status in the employ of the Trenton City Board of Education as a custodian. As such, respondent must conduct himself at all times in a fitting and proper manner. Uttering remarks found to be sexually harassing and offensive with teachers and particularly with pupil L.K. calls into question respondent's

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fitness for the task of school janitor. In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.&A. 1944) it was held that:

> ***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way***

Respondent, by his actions with teachers during 1986-87 and 1987-88 and through his conduct and words with L.K. has displayed unfitness for the task of being a member of the custodial staff in the employ of the Trenton City Board of Education. Accordingly, the only appropriate discipline in this case is respondent's termination of his tenured employment.

Therefore, the employment of Anthony Marion as a custodian with a tenure status with the Trenton City Board of Education is hereby terminated effective April 26, 1988, the date the Board certified these charges to the Commissioner for determination and simultaneously suspended respondent without pay.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

October 31, 1988
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

11/1/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 3 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY MARION,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the findings of fact and conclusion reached by the ALJ, the Commissioner adopts them as his own. The recommendation by the ALJ that respondent be terminated from his tenured position as a school custodian in the School District of the City of Trenton is determined to be an appropriate penalty given the serious nature of the tenure charges of which he has been found guilty herein.

The only modification to be made by the Commissioner with respect to the penalty of dismissal imposed upon respondent is that said termination shall be effective as of the date of the Commissioner's decision in compliance with the provision of N.J.S.A. 1BA:6-14 which reinstates respondent's salary on the 121st day after his suspension without pay by the Board.

All salary owing and due respondent as of the 121st day shall terminate as of the date of the Commissioner's decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 16, 1988

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BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Capehart & Scatchard (Joseph F. Betley, Esq., of Counsel)

For the Respondent, Joseph Weinberg, Esq.

This matter has been opened before the Commissioner of Education through the filing of a Petition for Declaratory Judgment by the Board of Education of the Township of Berlin (Board). The Board specifically raises the following issues before the Commissioner in its petition:

> I. Under the present statutory scheme, can a constituent local school district that is part of a limited purpose, 7-12 regional school district accomplish a partial return or reduction of the regional school district by returning seventh and eighth grades back to the local district?
>
> II. If so, does the Commissioner of Education have the authority to oversee and approve such partial return and/or reduction?
>
> III. Assuming that the present statutory scheme allows the Board to accomplish its purpose to once again educate its seventh and eighth graders within the Township, and assuming the Commissioner of Education has the authority to approve the decision, what is the proper procedure for implementing such a partial return and/or reduction?
>
> (Board's Memorandum, at p. 4)

It is observed that Respondent Board of Education of Lower Camden County Regional High School District (Regional Board) takes

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no position at this time with respect to the Board's Petition for Declaratory Judgment as indicated in its letter reply to the Commissioner dated November 7, 1988, which reads in pertinent part:

> It is our understanding from a review of the Petition for Declaratory Judgment, filed on behalf of the School District of the Township of Berlin, and supporting documents, that the Berlin Township Board of Education is requesting that the Commissioner of Education determine whether or not he has the authority to oversee and approve the partial withdrawal from a limited purpose regional high school district, and, if such authority exists, to set forth a procedure for such partial withdrawal. The Petitioner is not requesting that the Commissioner rule on a request for a partial withdrawal by the seventh and eighth grades of Berlin Township, and no such ruling will be rendered.
> (Regional Board's Letter Reply, at p. 1)

In its supporting memorandum, the Board presents two points of legal argument which claim that:

> I. THE COMMISSIONER HAS THE AUTHORITY TO PERMIT A REDUCTION OF A LIMITED PURPOSE REGIONAL SCHOOL DISTRICT
>
> II. THE BOARD'S PROPOSAL TO RETURN ITS SEVENTH AND EIGHTH GRADE STUDENTS CAN BE CONSIDERED A PARTIAL WITHDRAW FROM A LIMITED PURPOSE REGIONAL SCHOOL DISTRICT AS CONTEMPLATED BY N.J.S.A. [18A:]13-51 et seq.
> (Board's Memorandum, at pp. 6, 16)

The Commissioner has reviewed the position taken by the Board in its legal memorandum filed with its Petition for Declaratory Judgment. The specific legal arguments advanced by the Board are noted and incorporated herein by reference.

Essentially, the Board concedes that there is no specific statutory authority which empowers the Commissioner to effect a reduction of a limited purpose regional school district or to cause a partial withdrawal from a limited purpose regional school district.

The Board, however, maintains that the Commissioner is vested with broad general grants of supervisory power by both the Legislature and the Courts to entertain and approve the return of its seventh and eighth grade pupils from the Lower Camden County Regional High School District. In this regard, the Board relies on the provisions of N.J.S.A. 18A:4-10, 4-23 and 4-24, as well as the

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decisions of the Court in Jenkins v. Township of Morris School District et al., 58 N.J. 483 (1971); Robinson v. Cahill, 62 N.J. 473 (1973); and Laba v. Newark Board of Education, 23 N.J. 364 (1957).

In support of its position, the Board maintains that the above-cited decisions of the Court and other tribunals incorporated in its legal memorandum hold that the Commissioner must not only exercise his authority where there is an express statutory mandate, but must also recognize the full breadth of his implied powers to supervise the state public school system, especially the formation, enlargement, reduction of, and withdrawal from regional school districts. The Board further maintains that:

> ***The necessary and unavoidable corollary to the Commissioner's express power to allow the creation, establishment or enlargement of a regional school district [N.J.S.A. 18A:13-33 and 13-43] is the implied power to reduce or dismantle the district if, in the Commissioner's judgment and with the approval of the regional and local districts, such a reduction is in the best educational interests of the students involved and will further the constitutional mandate of a thorough and efficient system of public education. (Board's Memorandum, at p. 12)

And, further:

> As in the case of N.J.S.A. 18A:13-33, the withdrawal provisions speak only in terms of complete withdrawal - there is no express authority for a partial or piecemeal separation. Thus, the Board's arguments as to the breadth of the Commissioner's implied powers as expressed in Part I supra are equally pertinent under N.J.S.A. 18A:13-51. Indeed, the arguments are even more compelling, since the Legislature has explicitly given the Commissioner power to consider withdrawal petitions. Just as it is a necessary corollary that the Commissioner has the authority to reduce the purpose of a regional school district because of his inherent authority over the creation and maintenance of the regional district, it is equally logical that the Commissioner would have the implied power to consider a partial withdrawal application when the Commissioner would have unquestionable authority to consider a total withdrawal.
> (Id., at p. 17)

The Commissioner observes, however, that the Board's reason in seeking a partial withdrawal of the seventh and eighth grade pupils from the Lower Camden County Regional High School District is

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not because they are being deprived of a thorough and efficient education, but rather because it believes its seventh and eighth grade pupils can get the "best" education possible within its own district.

While the Commissioner agrees in part with the Board's position that the Courts, as well as the Legislature, have granted him broad supervisory power to grant relief in instances where the constitutional mandate for the provision of a thorough and efficient system of education in local public school districts is not being implemented or is being compromised, it may not be concluded nor has such a claim been asserted that such is the case in the instant matter.

Where the provisions of statutes enacted by the Legislature are clear on their face they may not be so liberally construed as the Board suggests. Had the Legislature intended to provide for the reduction of the purposes of a limited purpose school district or partial withdrawal from same, it would have so specified. See, e.g. Watt v. Mayor and Council of Borough of Franklin, 21 N.J. 274, 277 (1956) and Hoffman v. Hock, 8 N.J. 397, 409 (1952). Consequently, the Commissioner finds the statutes relied upon by the Board which authorize the Commissioner to permit the enlargement of the purposes of regional school districts or to permit the withdrawal from a limited purpose regional cannot serve to authorize the reduction of such purposes or the partial withdrawal from a limited purpose regional.

The Commissioner, upon review of those legal arguments advanced by the Board for declaratory judgment in its favor, finds and determines that the rationale presented herein by the Board would constitute an abuse of those implied powers vested in him by the Legislature, as well as the Courts, if he were to declare that he had the implied authority as the Board suggests to entertain its request and thereby permit the Board to seek the withdrawal of its seventh and eighth grade pupils from the Lower Camden County Regional School District.

The Commissioner discerns no authority vested in him by the Legislature or the Courts, implied or otherwise, which would permit him to construe the above-referenced statutory provisions as a means by which a constituent school district of a limited purpose regional school district could accomplish the partial withdrawal from a limited purpose regional school district.

Contrary to the Board's assertions, the Commissioner finds and determines that the doctrine of expressio unius est exclusio alterius[1] does in fact apply in the instant matter.

---

[1] A maxim of statutory interpretation meaning that the "expression of one thing is the exclusion of another.***" Black's Law Dictionary, 692 (rev. 4th ed. 1968)

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In the Commissioner's judgment he may not construe the provisions of the statutes or the Court decisions upon which the Board relies herein to reach the anomalous result that he has the authority to entertain partial withdrawal of the Board's seventh and eighth grade pupils from the Lower Camden County Regional High School District. The Commissioner so holds.

Accordingly, the Board's Petition for Declaratory Judgment is hereby dismissed.

COMMISSIONER OF EDUCATION

December 19, 1988

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 971-88
AGENCY DKT. NO. 361-12/87

CLEARVIEW SCHOOL
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Thomas J. Viggiano, Esq., for petitioner (O'Brien & Viggiano, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: October 1, 1988 Decided: November 4, 1988

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, Clearview School, appeals from a determination of the respondent, State Department of Education, that disallowed the salaries of two uncertified teachers from calculation of the 1985-86 tuition reimbursement.

PROCEDURAL HISTORY AND MOTIONS

The petitioner, a State-approved private school for the handicapped, filed a verified petition with the Commissioner of Education on December 11, 1987. The respondent's answer was filed on February 8, 1988. The Commissioner of Education transmitted the matter to the Office of Administrative Law on February 11, 1988, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

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A prehearing conference was held by the Office of Administrative Law on March 28, 1988. The resulting prehearing order defined and limited the issues to be decided, provided for discovery, scheduled the hearing and regulated other procedural aspects of the matter.

A motion for summary decision was filed by the State Department of Education on June 24, 1988. In the absence of a response from petitioner, respondent filed a motion on August 15, 1988 to suppress petitioner's defenses. On August 29, 1988, Clearview School filed a motion to extend the time for its response to the summary decision application.

The above motions were discussed at a hearing on September 6, 1988, the date previously scheduled for plenary hearing. Counsel for both parties agreed that no testimony would be required for a complete presentation of the case, because all of the material facts were uncontested. It was decided that, despite the several months of delay, it would be more suitable, under the circumstances, for the dispute to be decided on its merits. Petitioner was given a short period of time to file a brief and affidavits in opposition to respondent's motion for summary decision, together with his own cross-application for summary decision. These papers were filed on September 19, 1988, followed by the respondent's brief in opposition, filed on October 1, 1988, when the record closed.

ISSUES

The issues were defined in the prehearing order as follows:

A. Was the petitioner justified in employing Lisa Lubarsky and Sandra Hertzberg in September and December 1985, respectively, under circumstances where they were both uncertified at the time of employment, although Ms. Hertzberg was eligible for certification at the time and Ms. Lubarsky was entitled to an emergency certificate pursuant to a policy that was in effect on the date she was hired?

B. If the petitioner prevails as to one or both of the teachers, what are appropriate remedies?

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SUMMARY OF THE DISPUTE

N.J.S.A. 18A:26-2 prohibits the employment of teachers who do not hold valid certificates. *N.J.A.C.* 6:11-3.1 states that an uncertified teacher is not entitled to salary, and *N.J.A.C.* 6:11-3.2 invalidates their contracts of employment. Tuition on a per-pupil basis is paid to specialty private schools by the public school districts in which the students who receive special attention reside. The tuition rates paid to the special schools by the home districts are based on "allowable costs." *N.J.A.C.* 6:20-4.1. The salary of a professional staff member who is not certified but is functioning in a position requiring certification is a non-allowable cost. *N.J.A.C.* 6:20-4.4.

Both teachers were not certified when they were first employed. The Department of Education subsequently disallowed their salaries as costs that could be included in tuition rates for reimbursement, for the period of time prior to their certification.

FINDINGS OF FACT

The material facts extracted from the pleadings, briefs, affidavits, exhibits and other papers on file are as follows:

1. Lisa Lubarsky was employed by the Clearview School as a teacher of the handicapped on September 3, 1985. She was not certified for that position at the time.

2. Ms. Lubarsky completed course requirements in December 1985 at Montclair State College, and was then eligible to apply for certification as a teacher of the handicapped.

3. The petitioner's administrators knew Ms. Lubarsky did not possess the requisite certificate when they employed her, and they also knew she had not yet completed the courses required for certification.

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4. Sandra Hertzberg was employed by the Clearview School as a speech correctionist on December 15, 1985. She was not certified for the position at the time.

5. Ms. Hertzberg had previously completed the appropriate course requirements, in 1984, and she was eligible to apply for a standard certificate as a speech correctionist when she was hired in December 1985. However, she did not did so.

6. The petitioner knew that Ms. Hertzberg was not certified when it employed her.

7. At the time petitioner hired both of the above teachers, it knew of the legal requirements mandating teacher certification as a condition of employment.

8. The State Department of Education monitored the Clearview School on or about April 18, 1986, at which time the lack of certification of the above two teachers was discovered. The Division of Finance of the Department of Education informed the petitioner that the salary costs for the two teachers would be disallowed from the dates of their hiring to the time they would obtain certification.

9. Ms. Lubarsky applied for certification on April 29, 1986. Her certificate was mailed to her by the Department of Education on June 25, 1986, following the submission of additional data by Montclair State College.

10. Ms. Hertzberg applied for her certification on April 21, 1986. It was mailed to her on May 20, 1986.

11. In accordance with the foregoing, the salaries of both teachers became allowable costs as of June 1 and May 1, 1986, respectively, the first day of the month during which certification was granted to each.

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12. On January 14, 1985, before either Ms. Lubarsky or Ms. Hertzberg were hired, the Director of the Office of Teacher Certification of the State Department of Education, Dr. Celeste Rorro, issued a memorandum to county superintendents of schools, as follows:

> The Attorney General's office has rendered a legal opinion which provides for the issuance of emergency certificates in limited circumstances to teachers in approved private schools for the handicapped which operate with public funds and educate public school children. Emergency certificates will be issued in accordance with established procedures that require the approval of the county superintendent upon request of directors in such private schools.

Prior to that time, such emergency certificates were not issued. (An emergency certificate is issued in certain fields for one year, based on special circumstances, when school districts are unable to locate appropriately certified teachers.)

13. The petitioner was not aware of the issuance of the above memo, which would have enabled it to ask the teachers in question to apply for emergency certificates.

14. Neither of the two teachers involved applied for a standard certificate (which Ms. Hertzberg was entitled to) or an emergency certificate (which Ms. Lubarsky might have been able to obtain) at any time prior to the disallowance; nor did the Clearview School pursue the question of certification further or inquire about the possible availability of an emergency certificate for the teachers, until the disallowance.

15. An exchange of correspondence, some of it confusing, ensued, beginning in July 1987, among the Clearview School, Montclair State College, the State Department of Education and the Passaic County Superintendent of Schools, in an attempt by the petitioner to obtain reversal of the disallowance. The correspondence initiated by petitioner was based on the petitioner's assumption that the teachers were eligible for emergency certification during

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the period of disallowance. (Only Ms. Lubarsky might have benefited from an emergency certificate, since Ms. Hertzberg was entitled to a standard certificate.) The disallowances were confirmed by the State Department of Education, which elected not to reverse its position.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The applicable statutes and regulations are clear.

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach ....
> *N.J.S.A.* 18A:26-2.

> No teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate...
> *N.J.A.C.* 6:11-3.1(a).

> Any contract or engagement between a board of education and a teacher shall cease and be of no effect whenever said board shall ascertain by notice in writing that said teacher is not in possession of a proper teacher's certificate....
> *N.J.A.C.* 6:11-3.2.

Classes and facilities for handicapped children are governed by the provisions of *N.J.S.A.* 18A:46-1 *et seq.* State control of remedial services for handicapped children is extended to nonpublic schools as well as public schools. *N.J.S.A.* 18A:46-15; *N.J.S.A.* 18A:46-19.1. Budgetary control is maintained over such facilities by virtue of *N.J.S.A.* 18A:46-19.8, and the participation of the Commissioner of Education and the State Board of Education in the fixing of tuition rates is established by the authority contained in *N.J.S.A.* 18A:46-21.

The regulations concerning tuition for private schools for the handicapped are contained in *N.J.A.C.* 6:20-4.1 *et seq.*, where the subject of "allowable costs" is dealt with at length.

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:

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. . . .

3. The salary of a professional staff member who is not certified but is functioning in a position requiring certification.

N.J.A.C. 6:20-4.4(a)3.

Recognizing the clarity and certainty of the foregoing, petitioner nevertheless requests that the disallowed expense for the two uncertified teachers be restored because it claims that (1) at the time the monitoring took place in April 1986, the Clearview School was unaware of the possibility that emergency certifications might have been available, and (2) both teachers would have been eligible for emergency certification. Petitioner further argues that it was ill-informed about the new policy, and the prior policy prohibiting emergency certifications was not enforced in any event. However, petitioner also takes an opposite side of the argument by stating that the new policy, permitting emergency certification, violates the administrative code (presumably the Administrative Procedures Act) because it was not promulgated as a rule, but was issued instead in the form of a memo.

In effect, petitioner's final position is that an estoppel should be applied against the State because of inconsistent, vacillating and poorly enforced policies that led petitioner into a position where, although it hired uncertified teachers, it did not subsequently seek emergency certifications for them, which would have enabled it to eliminate or minimize the non-allowable costs.

In considering the foregoing, any argument relating to emergency certification cannot logically be applied to Ms. Hertzberg, who was eligible to apply for a standard, permanent certification when she was employed in December 1985. She simply did not make the application, nor did the Clearview School insist on it or at least promptly monitor her progress in that direction. Furthermore, an application for a teacher's certificate is not to be made by the employing school, but by the teacher herself. *Ruth E. Sydnor v. Board of Education of the City of Englewood, Bergen County*, 1976 *S.L.D.* 113. The petitioner's argument has no bearing in the case of Ms. Hertzberg.

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It is therefore **CONCLUDED** that the petitioner cannot prevail and the disallowed expense must stand as to Sandra Hertzberg.

However, the question of emergency certification can be considered in the case of Ms. Lubarsky.

The petitioner's claim that it was misled and lulled into inaction, to its detriment, by the State's frequently altered policy on emergency certification is not supported by the evidence. Ms. Lubarsky was employed in September 1985 without certification. She then completed the course requirements three months later, in December 1985. Presumably, she would have been eligible to file an application for a standard certificate at that time. She did not do so, and it was not until March 20 that the Director of Clearview School wrote a letter of inquiry to Montclair State College about her eligibility for standard certification. That delay, from December through March, had no connection with the emergency certification policy (even though it was the teacher's responsibility to file the application, not the employer's). The flurry of attention to the emergency certification problem only began after the State monitoring program identified the shortcoming.

Petitioner also argues that prior to the instant situation, the State Department of Education policy permitted schools to remedy discovered violations before the imposition of cost disallowances, citing *Bergen Center for Child Development, Inc. v. Division of Special Education, New Jersey Department of Education*, OAL DKT. EDU 18-87 (March 30, 1988), aff'd, Commissioner of Education (May 16, 1988).

The above decision does not support petitioner's position. Rather, it confirms and strengthens the need for a teacher to actually hold a certificate as a condition of employment. *Bergen Center for Child Development*, Commr's Decision at 35. The petitioner's reference to supporting material on page 14 of the OAL initial decision in that case is an excerpt from the testimony of a Department of Education employee who indicated that in 1983, uncertified staff members were given time to achieve certification, because there was no mechanism to require rebates to school districts that presumably had unwittingly paid tuition based on costs subsequently found to be non-allowable after monitoring and audit. The

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petitioner supplied no authority other than the above testimonial excerpt to support its contention that certification requirements were disregarded or loosely treated by the State in a manner that constituted selective enforcement against the Clearview School.

The Bergen Center for Child Development decision also affirms the precept that the requirements for certification cannot be satisfied in a *de facto* manner, if a teacher is only eligible by virtue of completion of the necessary course work. Reasonable leeway has been given when the application for certification was completed and pending, with nothing but the necessary paperwork to be processed by the Department of Education. However, no applications were filed in this case.

As mentioned above, petitioner seeks to impose an estoppel on the State that would entitle it to the relief it seeks. The doctrine of estoppel is not ordinarily applied to a governmental agency performing a governmental function to the same extent as it it against individuals and private corporations. 1 *A.L.R.* 2d. 349 (19 *Am. Jor.* 2d 168 at 820; *Bayonne v. Murphy & Perrett Co.*, 7 *N.J.* 298, 311 (1951); *Feldman v. Urban Commercial, Inc.*, 64 *N.J. Super.* 364 (Ch. Div. 1960). However, the doctrine of estoppel has been invoked by our courts against governmental agencies in order to prevent manifest wrong and injustice. *Vogt v. Borough of Belmar*, 14 *N.J.* 195, 205 (1954).

> The applicability of the doctrine of estoppel against public agencies and officials is quite limited, to guard against use thereof to injure the public interest. Although there is growing liberality in entertaining the rule in certain areas, *see Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 *N.J.* 1, 18 (1962), each case stands on its own facts. "The precise nature and extent'" of the plaintiff's "good faith reliance" on the official action or inaction relied on must be weighed against the public interests involved. *Id.* at p. 19. *Tubridy v. Consolidated, Etc. Pension Com.*, 84 *N.J. Super.* 254, 264 (App. Div. 1964).

See also, Skulski v. Nolan, 68 *N.J.* 179, 198 (1975); *Anske v. Borough of Palisades Park*, 139 *N.J. Super.* 342, 348 (App. Div. 1976); *Johnson v. Hospital Service Plan of N.J.*, 25 *N.J.* 134, 143 (1957).

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Uncertified teachers were hired to begin with, and Ms. Lubarsky had not even completed the required courses. There is no evidence that the petitioner promptly followed the situation and urged the teachers to file their applications for standard certification as soon as they were able to do so. This inaction ended only when the monitoring program exposed the defects that led to cost disallowance. Even if Ms. Lubarsky would have been entitled to an emergency certificate, pending application for the permanent certification, there is no evidence to show that the school made any attempt to inquire about the possibility of some change or exception to the policy before the monitor's visit.

It is true that there was one confusing and uninformed letter written by an employee of the county superintendent in August 1987 (corrected a week later). It is also true that the possibility of emergency certification in the case of Ms. Lubarsky existed for a time by virtue of the memorandum to county superintendents. However, petitioner has not shown that the county superintendent's office owed an affirmative duty to inform all of its school boards of the new directive, absent any inquiry or realization that a problem existed.

In the instant case, petitioner has not shown that it is entitled to an estoppel against the State, even as to Ms. Lubarsky, considering all of the circumstances. No manifest wrong and injustice was practiced against the Clearview School.

FINAL CONCLUSIONS

It is therefore **CONCLUDED** that the action taken by the respondent, declaring the salaries of the two teachers to be non-allowable costs in fixing the 1985-86 tuition rate to be paid to petitioner by sending districts for the period of time up to the effective date of their certifications, was justified and in accordance with law.

It is further **CONCLUDED** that the petitioner has not shown sufficient reasons why said costs should be allowed.

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ORDER

It is therefore **ORDERED** that the action of the Department of Education, disallowing the costs in question, should be **AFFIRMED** and the petition **DENIED**; thereby granting respondent's application for summary decision and denying petitioner's application.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN**, Commissioner, Department of Education, who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

I hereby file this Initial Decision with **Saul Cooperman** for consideration.

November 4, 1988
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

NOV 10 1988
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 10 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

ms/e

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CLEARVIEW SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
	:	
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the action taken by respondent declaring the salaries of the two teachers in question to be non-allowable costs in fixing the 1985-86 tuition rate to be paid to petitioner by sending districts for the period preceding the effective date of their respective certifications was appropriate and in accordance with law. In so finding, the Commissioner determines that petitioner has failed to carry its burden of establishing sufficient reasons why said costs should be allowed.

Accordingly, the Commissioner directs that the action of the Department of Education disallowing the costs in question be affirmed and the instant Petition of Appeal be denied, thus granting the State's application for summary decision and denying petitioner's application. In so directing, the Commissioner adopts the recommendation of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

December 20, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8227-87
AGENCY DKT. NO. 354-12/87

THOMAS BARAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, AND JAMES JACKSON,
Respondents.

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Robert T. Clark, Esq., for the Board
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Arthur N. Martin, Jr., Esq., for respondent James Jackson

Record Closed: September 28, 1988 Decided: November 7, 1988

BEFORE **JAMES A. OSPENSON,** ALJ:

Thomas Baran, a tenured teacher of technical occupations, holder of an endorsement therefor under N.J.A.C. 6:11-6.2(a)(29)[see also J-25 and J-26], and employed by the Board of Education of the City of Bayonne, Hudson County, alleged the Board adopted a resolution on April 23, 1987, terminating his employment in a reduction in force, but beginning with the 1987-88 academic year assigned teachers with less seniority than he to teach classes within the scope of his certificate endorsement, contrary to and in abridgment of his rights of tenure and seniority under N.J.A.C. 6:3-1.10. In a petition of appeal against the Board, he sought

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judgment directing his reinstatement together with back pay, interest and emoluments of position. The Board admitted his tenured position, admitted he was assigned and taught within scope of his endorsement limited to drafting, but contended the abolishment of position was for reasons of economy and efficiency within N.J.S.A. 18A:28-9 and denied petitioner's tenure or seniority rights were violated thereby. A petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on December 1, 1987. The Board's answer was filed there on December 9, 1987. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on December 11, 1987, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of administrative Law on February 16, 1988, and an order was entered. Petitioner was directed to give notice of pendency of suit to all persons presently employed by the Board whose positions were challenged by petitioner's claim of greater seniority and of their right to intervene and/or participate in the matter, in accordance with N.J.A.C. 1:1-16.1 et seq. Subsequently, the application of James Jackson to intervene was granted without objection [according to J-19, classroom assignment for Jackson for 1987-88 was for full-time employment including two periods of blueprint reading and the balance for industrial arts].

As provided in the prehearing conference order, at issue in the matter generally were (1) whether petitioner shall have proven by a preponderance of the credible evidence his tenure and/or seniority rights were abridged by the Board's abolition of position and employment of others less senior than he, under N.J.A.C. 6:3-1.10 [subsumed therein was timeliness of filing of the petition of appeal within 90 days from receipt of notice of action by the Board, as required by N.J.A.C. 6:24-1.2, which the Board pleaded as its first separate defense]; and (2) if so, whether petitioner was entitled to relief as demanded.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having admitted and/or stipulated, I make the following findings of fact:

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1. Petitioner Thomas Baran was regularly and continuously employed by the respondent Bayonne Board of Education from January 1, 1973 through June 30, 1987.

2. Throughout his employment with the Board, petitioner was assigned to teach in Bayonne High School, which contains grades 9 through 12.

3. Petitioner possesses the following certificates, issued by the State Board of Examiners:

   Teacher of Technical Occupations (Regular), issued February, 1973 (J-1) [see N.J.A.C. 6:11-6.2(29)]
   Elementary School Teacher, issued June, 1969 (J-2)

4. Petitioner is a tenured teaching staff member as the result of his employment with the Board.

5. A copy of petitioner's "Teacher's Record" is admitted and attached hereto as Exhibit J-3.

6. As set forth in the attached schedules, the petitioner has been assigned to teach the following classes:

	1972-73	Schedule Unavailable
(J-4)	1973-74	Advanced Mechanical Drawing, Rotating Shop 9
(J-5)	1974-75	Advanced Mechanical Drawing, Rotating Shop 9
(J-6)	1975-76	Advanced Mechanical Drawing, Rotating Shop 9, Rotating Shop 9, Blueprint Reading
(J-7)	1976-77	Mechanical Drawing, Advanced Mechanical Drawing, Drafting
(J-8)	1977-78	Mechanical Drawing, Advanced Mechanical Drawing, Drafting

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(J-9)	1978-79	Mechanical Drawing, Advanced Mechanical Drawing, Drafting
(J-10)	1979-80	Mechanical Drawing, Advanced Mechanical Drawing, Drafting
(J-11)	1980-81	Mechanical Drawing, Advanced Mechanical Drawing, Drafting
(J-12)	1981-82	Mechanical Drawing, Advanced Mechanical Drawing, Drafting
(J-13)	1982-83	Drafting, Introduction to Drafting, Mechanical Drawing, Advanced Mechanical Drawing
(J-14)	1983-84	Drafting, Introduction to Drafting, Mechanical Drawing, Advanced Mechanical Drawing
(J-15)	1984-85	Drafting, Introduction to Drafting, Mechanical Drawing, Advanced Mechanical Drawing
(J-16)	1985-86	Drafting, Introduction to Drafting, Mechanical Drawing
(J-17)	1986-87	Blueprint Reading, Introduction to Drafting, Mechanical Drawing

7. On April 23, 1987, the Board adopted a resolution terminating petitioner's employment, effective the end of the 1986-87 school year. (J-18)

8. A copy of the class schedules for vocational course teachers for the 1987-88 school year is admitted and attached hereto as Exhibit J-19.

9. For the 1987-88 school year, the Board has assigned a teacher, James Jackson, to teach two classes of "Blueprint Reading" per day. [See course description in R-1.] James Jackson has been regularly and continuously employed by the Board since September 1, 1976.

10. Copies of the following documents relating to James Jackson are admitted and attached hereto:

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Teacher's Record (J-20)
Certificate as Teacher of Industrial Arts, issued May, 1976 (J-21) [see N.J.A.C. 6:11-6.2(13)]

11. Part-time teachers in respondent's school district are paid at the rate of 1/5 of full salary for each period they teach each day.

12. A copy of the teachers' salary guide for 1986-87 is admitted and attached hereto as Exhibit J-22. The Board and Bayonne Teachers Association are currently negotiating a new collective bargaining agreement. In the interim, salaries for teachers are established by placement on J-22.

13. Copies of the following documents are admitted and attached hereto:

    (a) Letter, dated December 21, 1972 (J-23);
    (b) Letter, dated January 18, 1973 (J-24);
    (c) Letter, dated March 28, 1973 (J-25)
    (d) Letter, dated June 19, 1973 (J-26)

14. The following teachers have been assigned to teach the course of "Blue Print Reading" since the 1973-74 school year. These teachers' respective Certifications are attached.

1973-74	Louis Usarzewicz, Jr.; Certification Drafting (J-27)
1974-75	Joseph Currao; Certification - Machine Shop (J-28)
1975-76	Thomas Baran; Certification - Technical Occupations, Drafting (J-29)
	Francis Curtis; Certification - Air Conditioning and Refrigeration (J-30)
	Alex Alexander; Certification - Drafting and Design (J-31)
1976-77	Francis Curtis; Certification - Air Conditioning and Refrigeration (J-30)

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	William McGillis; Certification - Cabinet Making (J-32)
1977-78	Austin Hoffman; Certification - Technical Occupations, Electrical Maintenance (J-33)
1978-79	William McGillis; Certification - Cabinet Making (J-32)
1979-80	William McGillis; Certification - Cabinet Making (J-32)
	Francis Curtis; Certification - Air Conditioning and Refrigeration (J-30)
1980-81	William McGillis; Certification - Cabinet Making (J-32)
1981-82	William McGillis; Certification - Cabinet Making (J-32)
1982-83	William McGillis; Certification - Cabinet Making (J-32)
1983-84	William McGillis; Certification - Cabinet Making (J-32)
1984-85	William McGillis; Certification - Cabinet Making (J-32)
	Michael Cantore; Certification - Industrial Arts, Carpentry (J-34)
1985-86	James Jackson; Certification - Industrial Arts (J-35)
1986-87	James Jackson; Certification - Industrial Arts (J-35)
	Thomas R. Baran; Certification - Technical Occupations (J-29)
1987-88	James Jackson; Certification - Industrial Arts (J-35)

EVIDENCE AT HEARING

Concerning timeliness of filing of the petition of appeal, petitioner Thomas J. Baran testified he first discovered that respondent Jackson had been assigned to teach two courses of blueprint reading for the 1987-88 school year in late September 1987. He learned that from other people at the school who saw a schedule of classes to be taught by Jackson. Petitioner thought he was to be assigned to teach such classes. Shown J-19, which showed Jackson's two assigned classes in blueprint reading for 1987-88, petitioner said he first saw it after the end of September 1987. Usually, he said, such schedules were posted. Petitioner said he was not, of course, in the school system at the time. He said the practice was for teachers to receive

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tentative scheduling in June of the preschool year. Assignments were usually given out by department supervisors. The only notification he received was a class schedule without assigned teachers that was put in his mailbox in the previous April 1987. Blueprint reading was indeed listed, he said, with expected numbers of students, but without names of faculty assigned. In fact, he said, he was unaware that the blue print course would be taught by any particular teacher until late September 1987.

Petitioner rested.

Called by the Board, Dr. Michael A. Wanko, who has been employed by the Board since 1969, has been principal of Bayonne High School since 1981. Tentative schedules for curriculum for 1987-88 were required by contract to be announced by June 15, 1987, under the teachers' negotiated agreement. That was done by the director of vocational education, Herman Purdy, at a departmental meeting. Wanko said Jackson was given his copy of the curriculum at that meeting. He thought Jackson's name appeared on the list. Concerning the reduction in force of April 1987, Wanko said, he gave a recommendation for elimination of ten positions, including elimination of one drafting teaching position. For 1987-88, he said, he assigned the blue print reading course to respondent Jackson because he was certified in industrial arts, he had had experience since 1985, and he had room in his schedule, which showed two periods available. See J-19. For assignments in the past, he said, it was decided to assign those who had available room in their schedules. Blueprint reading was not a required course, but rather an elective. Different teachers were assigned to it under several differing certifications.

There was no job description or resolution of the Board designating any specific teacher certification for blueprint reading.

Wanko identified a course book entitled "Course of Study--Blueprint Reading," which a retired teacher, William McGillis, wrote in 1973. R-1. A certified industrial arts teacher, McGillis himself taught the course for some eight years. The book is currently maintained in the director's, principal's and teachers' offices. He believed the book must have been adopted officially by the Board as core curriculum because the high school passed State monitoring five years ago. If that were not so, he offered, he otherwise could not be sure because some 100 courses were approved

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by the monitors in the curriculum. Students who take blueprint reading, he said, are vocationally oriented. It is not a complicated course.

He said if he had not assigned respondent Jackson to classes of blueprint reading, he would have had a partial schedule only, not a full-time schedule. Jackson was needed to teach carpentry under his industrial arts certification, which Jackson possessed, but which petitioner did not possess. Thus, he said, Jackson was not riffed and his schedule was filled out so as to give him a full-time position.

On cross-examination, Wanko conceded he doubted if petitioner had ever seen the master scheduling for the blueprint reading course teaching assignments for 1987-88 or, specifically, if petitioner had ever seen Jackson's specific scheduling assignment for 1987-88. Petitioner was not at the time in the district.

Assignment of Jackson to the two courses in blueprint reading, he said, was a way of maximizing the district's deployment of personnel.

The Board and respondent Jackson rested.

Thereafter, with consent of all parties, the administrative law judge adjourned hearing in the matter in order to submit the stipulation of facts (J-1 through J-35) and the pamphlet "Course of Study--Blueprint Reading" (R-1) to the Hudson County superintendent of schools, under N.J.A.C. 6:11-3.6(b), for a determination of the appropriate certification and title for the position, for seniority purposes, of teacher of blueprint reading. Subsequently, the county superintendent of schools by letter to the parties dated June 30, 1988, and filed in the cause on July 5, 1988 as J-36, concluded that both petitioner Baran and respondent Jackson were assigned within the general scope of the high school/vocational curricula organization of the Bayonne school district to teach blueprint reading as required by the number of pupils and curriculum areas. Both are eligible, the county superintendent said, within the scope of their certificates, to teach the related course of blueprint reading. No certificate or endorsement is issued by the State Board of Examiners to teach blueprint reading. Certification of a vocational/industrial education teacher enables him/her to teach related subjects as an integral and concurrent segment of the specific or general vocational subject area. For example, a teacher of machine trades may teach a course in blueprint reading as a requisite to training machinists

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and a general business education teacher may teach business arithmetic as a requisite for training bookkeepers.

DISCUSSION

I

It may be well to address as a first order of business the issue raised by the Board in its first separate defense, namely, timeliness of filing of the petition of appeal within 90 days after receipt of notice of action by the Board, as required by N.J.A.C. 6:24-1.2. Important to remember here, in my view, is that the gist of petitioner's action against the Board is not Board action in terminating his position on April 23, 1987 in a reduction in force effective for the 1987-88 school year. Gist of the action is petitioner's challenge to action of the Board in employing another with less seniority than he within the scope of his certificate endorsement, contrary to and in abridgment of his rights of seniority under N.J.A.C. 6:3-1.10. As petitioner argued, tentative teaching schedules for the 1987-88 school year were distributed in mid-June 1987, but evidence is clear that petitioner had no knowledge then that another or others would be installed in the position he challenges until late September 1987. Thus, it seems clear, petitioner had no early knowledge of any "controversy or dispute," within the meaning of N.J.A.C. 6:24-1.2, until a time well within the 90-day limiting period, since his petition was filed in the Bureau of Controversies and Disputes on December 1, 1987. In short, the petition here challenged not the legal sufficiency of a reduction in force, but the alleged violation of seniority rights brought to his attention five months after first knowledge of the rif at a time, for all intents and purposes, when petitioner was otherwise presumably installed on a preferred eligibility list, as was his right under N.J.S.A. 18A:28-12.

Based on the foregoing, I **CONCLUDE** the petition of appeal here was timely filed under N.J.A.C. 6:24-1.2. See Stockton v. Board of Ed. City of Trenton, 210 N.J. Super. 150, 157-8 (App. Div. 1986). The first separate defense to the petition of appeal, therefore, is **DISMISSED**.

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II

Petitioner argued essentially that his seniority rights were violated by the Board when it assigned two classes in blueprint reading for 1987-88 to intervenor James Jackson. Petitioner conceded he did not challenge the reduction in force itself but rather its implementation, allegedly in violation of N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10. Petitioner, it was argued, had seniority in a secondary category as teacher of technical occupations, while Jackson had tenure and seniority in a secondary category as teacher of industrial arts but had never taught blueprint reading, as petitioner had done in 1975-76 and 1986-87. Since the county superintendent of schools in his opinion of June 30, 1988 (J-36) concluded both petitioner and intervenor could properly have taught blueprint reading within the scope of their two respective certificate endorsements, it was argued, petitioner's seniority and thus entitlement to the position for 1987-88 was superior, the assignment of those two blueprint reading classes to Jackson thus being a violation of his tenure and seniority rights.

The Board argued that petitioner's seniority rights were not violated when it exercised its administrative reorganizational authority to assign the "non-certificated" course of blueprint reading to intervenor Jackson, who held tenure and thus seniority as teacher of industrial arts instead of to petitioner whose tenure and seniority was in the position and category of teacher of technical occupations--drafting. Though both petitioner and Jackson were qualified within the scope of their respective certificates to teach the non-certificated two periods of blueprint reading in question during 1987-88, since the course was non-certificated and not the subject of any regulatory endorsement under N.J.A.C. 6:11-6.2, the only "vacancy" in teaching position for 1987-88 was petitioner's vacated teacher of technical occupations position. That is, petitioner's position for 1987-88 was ended; Jackson's position as industrial arts teacher was not. It continued, the Board urged, and in order to avoid fragmentation and the employment of two part-time teachers, Jackson was assigned the two ancillary classes in blueprint reading, permissible, according to the county superintendent, within the scope of both petitioner's and Jackson's certificate teaching endorsements. The assignment was a legitimate adaptive reorganizational measure by the Board, was not arbitrary, and was within guidelines set forth in Hart v. Ridgefield Board of Ed., 1985 S.L.D.--(June 7, 1985), aff'd State Board of Ed., 1985 S.L.D.--(December 6, 1985); aff'd, App. Div., Docket No.

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A-2176-85T6 (November 7, 1986) (referred to as "Hart I"); and Hart v. Ridgefield Board of Ed., 1986 S.L.D.--(September 8, 1986) (referred to as "Hart II"). I think the Board's analysis is correct.

Having considered stipulations and findings of fact, as well as arguments of the parties in memoranda of law, I **FIND** and determine as follows:

1. The blueprint reading course taught by petitioner is not in a special subject field category under N.J.A.C. 6:3-1.10, nor is blueprint reading an endorsement on any certificate issued by the State Board of Examiners under N.J.A.C. 6:11-6.2;

2. No seniority accrues for employment in the teaching of blueprint reading under N.J.S.A. 18A:28-10, 12 or N.J.A.C. 6:3-1.10; such employment is not subject to competing seniority claims, under Hart I;

3. Petitioner's position of teacher of technical occupations (drafting) (N.J.A.C. 6:11-6.2(29)) having been riffed, there was no such vacant teaching position in 1987-88 to which petitioner was entitled by virtue of his seniority under N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10;

4. The only "vacant," that is, the challenged position, in 1987-88 was that in which intervenor Jackson was tenured as teacher of industrial arts (N.J.A.C. 6:11-6.2(13)), while petitioner was not;

5. No right existed in petitioner to require the Board to fragment existing positions held by others to provide him part-time employment, under Hart II; see also Goodwin-Davis v. Board of Ed. Ewing Township, 1985 S.L.D.--(April 29, 1985; slip op. at 3, 12); and

6. Assignment of intervenor Jackson to a full-time teaching position of both industrial arts and blueprint reading in 1987-88 by the Board was reasonable; correspondingly, not to assign intervenor Jackson to teach industrial arts part-time and petitioner to teach blueprint reading part-time was both lawful and reasonable.

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CONCLUSION

Based upon the foregoing, I **CONCLUDE** the petition of appeal should be, and is hereby, **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **Saul Cooperman** for consideration.

November 7, 1988
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

11/14/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 14 1988
DATE

Ronald L. Parker, Acting Director & Chief ALJ

amr

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THOMAS BARAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
JAMES JACKSON,	:	
INTERVENOR.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board indicated it would not be filing cross-exceptions, indicating that petitioner's exceptions "do not raise any new issues which were not addressed in the respondent's initial brief dated October 21, 1988. Therefore the respondent will rely upon its initial brief and the initial decision filed by Judge James A. Ospenson." (Correspondence from Robert T. Clarke, Counsel for the Board, dated November 28, 1988)

Petitioner posits two exceptions, which are summarized, in pertinent part, below.

Exception I states:

> THE DECISION BELOW CONSTITUTES A VIOLATION OF THE STATUTORY AND REGULATORY MANDATES REGARDING TENURE AND SENIORITY AND MUST BE OVERTURNED.

Petitioner submits that the initial decision "seek[s] to isolate Blueprint Reading instruction from the control of seniority regulations without either statutory or even codified regulatory authority to do so." (Exceptions, at p. 4)

He contends that there is nothing inherent in a course such as blueprint reading or the seniority regulations which exempts that form of instruction from seniority. He avers that even if some regulatory exception did exist, which he submits does not, he would argue that it was without statutory basis since N.J.S.A. 18A:28-10, the enabling statute for N.J.A.C. 6:3-1.10, provides for no exceptions. Thus, petitioner avers:

> Denying seniority claims to Blueprint Reading instruction gives local boards the power to

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3843-88
(ON REMAND OF EDU 6011-87)
AGENCY DKT. NO. 215-7/87

GEORGIA WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY, PATRICIA DEMAIO, AND ROBERT SOBIESKI,
Respondents.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

James S. Rothschild, Jr., Esq., for the Board
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Gregory T. Syrek, Esq., for respondent DeMaio
(Bucceri and Pincus, attorneys)

Harold N. Springstead, Esq., for respondent Sobieski
(Aronsohn & Springstead, attorneys)

Record Closed: November 1, 1988 Decided: November 14, 1988

BEFORE **JAMES A. OSPENSON,** ALJ:

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The Commissioner would emphasize that both the State Board and the Appellate Court affirmed the Commissioner's decision, as stated above. Thus, the Commissioner dismisses as being without merit petitioner's contention that the Commissioner's and the ALJ's decisions in this regard are in contravention of the law.

Because seniority is not at issue, the Commissioner finds petitioner's reliance on Camilli, supra, inapposite, since that case held that although Camilli had never taught the course, where a teacher's endorsement for physical science included physics, he was entitled by virtue of his years of teaching under that endorsement to teach that subject area. In the instant matter, it is stipulated that both petitioner and intervenor by virtue of their respective endorsements were properly certified to teach blueprint reading and in fact had both taught the course. Yet seniority is simply not at issue in the instant case because they served as instructors of the course under different endorsements.

The instant matter reduces then to a determination as to whether under the instant facts it is unreasonable to expect a board to accommodate two part-time positions instead of one full-time position. The Commissioner deems that the Board's judgment in this instance was reasonably taken, petitioner having failed to sustain its burden of demonstrating that it would be unreasonable for the Board to fail to assign him two sections of blueprint reading over Mr. Jackson. He so finds. See, by way of contrast, Irene Bartz v. Board of Education of the Twp. of Green Brook, decided by the Commissioner May 24, 1985, aff'd St. Bd. November 6, 1985, aff'd N.J. Superior Court, Appellate Division January 28, 1987; Irene Bartz v. Board of Education of the Twp. of Green Brook: Marilyn Burke v. Board of Education of the Twp. of Green Brook, decided by the Commissioner June 11, 1986, aff'd in part/rev'd in part State Board August 5, 1987; Irene Bartz v. Board of Education of the Township of Green Brook, decided by the Commissioner November 12, 1987.

Lastly, the Commissioner would correct the unartful use of the term "non-certificated" course of blueprint reading mentioned in the initial decision, ante. In fact, all courses must be taught under some endorsement under an instructional certificate.

Accordingly, with the above clarifications, the Commissioner adopts as his own the findings and conclusions of the ALJ below dismissing the instant Petition of Appeal with prejudice.

COMMISSIONER OF EDUCATION

December 22, 1988

Pending State Board

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Therefore, petitioner and intervenor in this case are not vying for seniority under the same endorsement; neither, therefore, has absolute claim to the position since the subject may be taught under either endorsement. Thus, the Board must make an educational judgment as to which person holding the proper endorsement to teach blueprint reading shall do so and can assign classes to one or the other to create a single assignment instead of two. See Mary Hart, decided by the Commissioner June 7, 1985, supra, where, in a similar fact pattern involving a course in family life, it is stated:

> Seniority comes into play in the assignment of family life teaching when a reduction in force occurs in a district wherein a board of education has designated a particular discipline (such as health or biology) as appropriate to teach a given level or sequence in its family life program. For example, when a reduction in force occurs in a district wherein the board has designated that specific portions of its family life education program at the secondary level are to be taught by an individual with a biology endorsement, seniority would come into play in determining which biology teacher is to be assigned. Seniority would not come into play in terms of the board being compelled to assign a teacher with home economics endorsement to any portion of its family life program it has designated to be taught by a teacher with biology endorsement merely because N.J.A.C. 6:29-7.1 permits individuals with home economics endorsements to teach in the family life program.
>
> Consequently, it is determined that petitioner is not entitled by virtue of her home economics seniority to teach the family life program segments the Board has designated as appropriate for instruction by a staff member with a health endorsement. Nor does she have a priori seniority entitlement to that portion of the curriculum taught by Mr. Manto. If the Board for sound educational reasons and in good faith determines that those segments taught by Mr. Manto are best taught by an individual with a home economics endorsement, as opposed to any other authorized endorsement, then petitioner may be assigned those class periods of family life education which he taught. However, the Commissioner is constrained to emphasize, as he did in Dorothy Godwin Davis v. Bd. of Ed. of Ewing, decided by the Commissioner April 29, 1985, that a board of education is not compelled to rearrange its schedule to suit petitioner and maximize its schedule of course offerings to coincide with her instructional endorsement. (emphasis in text)
>
> (Hart, June 7, 1985, at pp. 14-15)

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acknowledges that he holds an instructional certificate with subject area endorsement as a Teacher of Technical Occupations and has been employed in this capacity from January 1, 1973 through June 30, 1987 while the intervenor holds an instructional certificate with an endorsement as a Teacher of Industrial Arts and has been teaching in the district since the 1976-77 school year. Petitioner further claims he is entitled to assignment as the teacher of blueprint reading because of his greater seniority in his category than the overall seniority of Intervenor Jackson. He so argues recognizing the opinion of the County Superintendent of Schools that both he and Mr. Jackson are properly certified to teach the course in blueprint reading. "Since the class is within the scope of both seniority categories (Teacher of Technical Occupations and Teacher of Industrial Arts), it follows that the individual with the greater seniority in his own category should be assigned the course." (Exceptions, at p. 13) He relies, inter alia, on Camilli v. Bd. of Ed. of the Northern Highlands Regional High School District, decided by the Commissioner May 1, 1985, in support of his contention. Petitioner reiterates his argument that the blueprint reading classes in question are within the scope of his endorsement. His seniority is greater than that of Intervenor Jackson, he contends. Further, he states, "The fact that they are in separate seniority categories is irrelevant where, as here, the courses in question are within the scope of each endorsement and seniority category." (Exceptions, at p. 14) Petitioner submits, in conclusion, that the initial decision should be reversed.

Upon a careful and independent review of the record before him, the Commissioner adopts the initial decision for the reasons expressed therein as clarified below.

The Commissioner will first address petitioner's argument that his seniority rights have been violated.

Under the seniority regulations, N.J.A.C. 6:3-1.10 et seq., the category in which one accrues seniority is limited to two areas of acquisition, elementary and secondary. Furthermore, there are only three kinds of permanent certificates available - instructional, educational services and administrative. Under normal circumstances an endorsement on an instructional certificate carries authority to teach subject areas within the scope of that endorsement. For example, an English endorsement on an instructional certificate enables an individual to teach English in all public schools within the secondary category, N.J.A.C. 6:11-6.2(a)7, while an endorsement in comprehensive science authorizes the holder to teach comprehensive science including physics, chemistry, biological sciences, as well as earth and space science other than geography. N.J.A.C. 6:11-6.2(a)(21)i; see also Camilli, supra. Seniority, then, is determined by category under a specific endorsement, not by course.

However, in the instant matter, either one of two separate instructional endorsements has been authorized to teach the unrecognized title known as blueprint reading in the Board's district, as noted by the ALJ and the County Superintendent.

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> assign teachers at their whim, regardless of the tenure rights of others. The tenure and seniority system exists to prevent abusive job manipulation and its purposes remain valid today. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).
>
> (Id., at p. 6)

Thus, finds petitioner, the initial decision had no authority to create such an exemption and, thus, the initial decision supporting it must be reversed. He claims that while there may not be a separate seniority category for blueprint reading, assignment to the position must be based on the relative seniority of individuals who are properly certified to teach the course.

Further, petitioner claims a similar conclusion is warranted regarding the findings in Hart v. Ridgefield Board of Education, decided by the Commissioner June 7, 1985, aff'd State Board December 6, 1985, aff'd N.J. Superior Court, Appellate Division November 7, 1986; Hart v. Ridgefield Board of Education, decided by the Commissioner September 8, 1986; and Dorothy Godwin Davis vo Bd. of Ed. of Ewing Township, decided by the Commissioner April 29, 1985, aff'd St. Bd. September 4, 1985. Petitioner contends these cases stand for the proposition that a board may avoid tenure and seniority protections by asserting that it does not want to fragment a full-time position. Petitioner asserts that this conclusion is not supported by any provision of the statutes or regulations governing tenure and seniority. "As such, it represents an invention of an administrative agency in which scheduling wishes, of a local board are deemed to supersede tenure and seniority rights." (Exceptions, at pp. 8-9) He contends that to so apply Davis, supra, would permit a board to assign a more senior teacher's classes to other less senior teachers and rationalize this behavior as an attempt to fill out the schedules of these teachers, resulting in the termination of a more senior teacher.

Exception II states:

> THE BOARD VIOLATED THE PETITIONER'S SENIORITY RIGHTS.

Exception II is a nearly verbatim recitation of the argument petitioner set forth in his brief, which is incorporated herein by reference. He reiterates the contention that his seniority rights were violated by the Board as a result of its assigning two classes of blueprint reading to the intervenor. Acknowledging that there is no express seniority category for blueprint reading, petitioner suggests if such a category exists, it must be attached in some way to N.J.A.C. 6:3-1.10(1)15, 16, or 17, which link seniority with the specific teaching certificate held by an individual.

Petitioner concedes that both he and the intervenor taught exclusively at the secondary level and, thus, he claims, their seniority is governed by N.J.A.C. 6:3-1.10(1)(15)(i). Petitioner

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Georgia Williams, a tenured teaching staff member employed by the Board of Education of the Township of Livingston, Essex County, was advised by the Board on June 4, 1987, that she would be riffed from her tenured position as guidance counselor and reassigned to a position of teacher for the 1987-88 school year. In a petition of appeal filed with the Commissioner of the Department of Education, she alleged that the Board determined to retain Patricia DeMaio and Robert Sobieski in guidance positions in the secondary category even though they were less senior than she in that category or were untenured, contrary to tenure and seniority rights under N.J.S.A. 18A:6-10, 28-10 and N.J.A.C. 6:3-1.10 et seq. She sought judgment against the Board and individual respondents instating her in the position or positions challenged, differential back pay with other emoluments and such further relief as under the circumstances was just. The Board admitted petitioner's tenure and seniority generally but denied impropriety or illegality in the respective assignments, contending its action was predicated upon advisory seniority opinions of the Commissioner of the Department of Education and was otherwise within its managerial prerogative. Respondent DeMaio denied allegations of the petition generally and in cross-claim against respondent Sobieski alleged that if petitioner's claims against DeMaio were upheld, she would be entitled to the guidance counseling position assigned by the Board to respondent Sobieski. Respondent Sobieski left petitioning parties to their proofs.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on July 13, 1987. The Board's answer was filed there on August 6, 1987. The Commissioner transmitted the matter to the Office of Administrative Law on September 2, 1987, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. The matter was amicably settled by the parties and a settlement agreement approved by the administrative law judge on March 31, 1988. In a decision of May 20, 1988, the Commissioner rejected the settlement and remanded the matter to the Office of Administrative Law for further proceedings on May 24, 1988, under OAL Dkt. No. EDU 3843-88.

On notice to the parties, the matter came on for prehearing conference and an order was entered on July 15, 1988. The prehearing order provided that hearing was to take place on November 1, 1988. Hearing was conducted and concluded then and the record closed.

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At issue in the matter generally, it was provided in the prehearing conference order, was determination of the relative tenure and seniority rights of the parties in the two guidance positions in the secondary category.

At outset of hearing on November 1, 1988, petitioner withdrew and dismissed her claims against respondent Sobieski with prejudice to reinstatement of any action against him based on the rif purportedly effective for 1987-88 that gave rise to the present action against him. It was agreed that respondent Sobieski remained employed as guidance counselor and science teacher for 1987-88 and so remains today. Respondent Sobieski consented to such withdrawal and dismissal. Respondent DeMaio withdrew any defense in answer to petitioner's claims against her in the petition of appeal and withdrew her cross-claims against respondent Sobieski. A letter to that effect from respondent DeMaio's attorneys was filed in the cause on November 1, 1988.

Confirming its letter filed in the cause on October 7, 1988, the Board represented at hearing on November 1, 1988 that it interposed no defense to the claims of petitioner or to any matters alleged in cross-claim. The Board asserted that during the course of the 1987-88 school year, a guidance counselor position opened up in the district. Accordingly, it said, the Board appointed petitioner to the position. As a result, it said, since the appointment was made during the same school year in which the earlier rif occurred, petitioner did not lose any seniority, nor did she lose any other employment emolument. Presently, the Board represented, petitioner Williams and respondents DeMaio and Sobieski are all serving in guidance positions. That circumstance was conceded by all parties.

As a result, therefore, the sole remaining issue in the matter is admeasurement of the respective seniority service of petitioner and respondent DeMaio as of date of hearing, November 1, 1988. That determination would appear to be in accord with the Commissioner's remand of May 19, 1988 for such determination by way of summary judgment on a stipulation of facts or, failing that, judgment after hearing on the merits.

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EVIDENCE AT HEARING

From documents admitted into evidence, which were not challenged or refuted, I **FIND** and determine that respondent DeMaio was issued an educational services certificate in student personnel services (N.J.A.C. 6:11-12.13) by the State Board of Examiners on April 29, 1982. P-1. DeMaio was informed by the high school principal on September 1, 1982 that her application for a position of guidance counselor for 1982-83 had been rejected in favor of another candidate. P-2. The Board on June 13, 1983 by motion carried at its meeting of June 13, 1983 approved DeMaio's transfer from classroom teacher to guidance counselor in the high school, effective September 1, 1983 through June 30, 1984. P-3 and P-7.

The director of guidance noted in a letter to DeMaio on March 29, 1985 that she was then completing her second year as guidance counselor and would be eligible for tenure on September 1, 1985, if so employed for 1985-86. P-4. The director of guidance had informed DeMaio the previous year, on March 30, 1984; that she was then completing her first year as guidance counselor. P-5. For the school years 1981-82 and 1982-83, DeMaio had been carried on the employment rolls of the district and classified merely as teacher of English and not as guidance counselor. P-8 and P-9. DeMaio was carried on the employment rolls of the district for the school year 1983-84, however, as guidance counselor, for the first time. P-10; but see P-12.

Petitioner Georgia Williams was employed as a science teacher from September 1, 1964 through June 30, 1981. From that time until the present time, she was employed either part-time or full-time as guidance counselor from September 1, 1981 to date, November 1, 1988. P-13. That period of some 72 months, less one month of a two-month approved child-rearing leave of absence, and 25 and five-sevenths days for part-time service during a 60-day period, constituted a net service in petitioner's seniority of 70 months and four and two-sevenths days.

If DeMaio's service as guidance counselor commenced at date of issuance of her guidance counselor certificate on April 29, 1982 and extended to date, November 1, 1988, her total seniority service would be 64 months. If, however, DeMaio did not creditably serve as guidance counselor from April 29, 1982 to the

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end of that school year or at any time during 1982-83, her seniority would be but 52 months. See P-12.

The resulting factual issue for determination, then, became whether DeMaio's questioned service for two months in 1981-82 and ten months in 1982-83 were creditable for seniority. It was undisputed, of course, that DeMaio had achieved transfer or promotional tenure as guidance counselor under N.J.S.A. 18A:28-6(c).

Called by petitioner for testimony, Catherine M. Mignone, employed by the Board as an elementary teacher, testified she had never been employed by the Board as guidance counselor. But in 1981, she said, she helped institute in the elementary schools a program for single-parent groups, which ultimately was changed into the changing family project (P-6). In 1981-82 and 1982-83, she said, DeMaio served in the same program at the high school. The project involved sessions for children with single parents or recently deceased parents to air their views in group session. DeMaio said she never dealt with or counseled single students. The program was what she described as a rap session, started initially after school and then gradually in later years assimilated into the school day. She never held any guidance counselor certificate. Another teacher involved in the program was Fred Ecke, who was not certified as a guidance counselor.

Donald Turner, who was employed by the Board as director of guidance in the district from 1978 to June 1985, testified he held during that time the educational services certificate of director of pupil personnel services. (See N.J.A.C. 6:11-12.12.) His affidavit was admitted into evidence as P-11. He was aware of the single-parent group system, but said it never came under his jurisdiction or direction. There was no formal curriculum for these groups; he said he never was aware of or saw P-6. The only connection the guidance department had with the single-parent groups was to supply names of potential participants. Although DeMaio appeared occasionally at departmental meetings of the guidance department, he said, her purpose was only as a visitor and not as a member, to explain workings of the single-parent group. For teaching staff to participate in the program, he said, there was no requirement they hold guidance counselor certification. He evaluated all guidance counselors, but not any teaching staff members connected with the single-parent groups.

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In his affidavit in P-11, Turner said that during his tenure no one became a guidance counselor at the high school without his interviewing them. He never interviewed DeMaio for a high school guidance position until 1983, when he did so preparatory to filling a vacant position for the 1983-84 school year. He never observed or evaluated DeMaio during the school years 1981-82 or 1982-83. During his tenure, he said, DeMaio was not assigned students for guidance purposes during those years. Her basic position was teaching; her teaching assignments were reduced by one period to give her time to run the single-parent group as an activity in the elementary school where she was employed. He specifically attested to the fact that DeMaio was not one of seven official guidance counselors at the high school during 1981-82 or 1982-83.

The curriculum for the changing family project (P-6) announced it as an elementary school program for children in a changing family structure, designed to provide a place for young people to explore their feelings about their family changes. Children were conditioned to learn that others have similar feelings and frustrations. Groups were structured to help children view divorce realistically and, through supportive activities, to develop a sense of belonging to the group. P-6 at 3.

From the above, I **FIND** and determine that respondent Patricia DeMaio never served in a guidance counselor position at any time during the 1981-82 or 1982-83 school years, within the meaning or under the authority of N.J.A.C. 6:11-12.13, despite her having received an educational services certificate in student personnel services issued by the State Board of Examiners on or about April 29, 1982. Such service as she may have had in any single-parent group activity in those years was not creditable for either tenure or seniority as a guidance counselor within the meaning of N.J.S.A. 18A:28-9 et seq. or N.J.A.C. 6:3-1.10(b).

CONCLUSION

Based on the foregoing, I **CONCLUDE** (1) that petitioner, a tenured guidance counselor employed by the Board from September 1, 1981, to date, November 1, 1988, with interruptions hereinabove referred to, has accrued seniority in the category of 70 months and four and two-sevenths days; and (2) that respondent DeMaio, a tenured guidance counselor employed by the Board in that position only

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from 1983-84 to date, November 1, 1988, has accrued seniority in the category of 52 months.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **Saul Cooperman** for consideration.

November 14, 1988
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

11/16/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1988
DATE

Ronald I. Parker, Acting Director & Chief ALJ

amr

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GEORGIA WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, PATRICIA DE MAIO, AND ROBERT SOBIESKI, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Admnistrative Law on remand have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner adopts the ALJ's findings and conclusions as the final decision in the matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 28, 1988

DATE OF MAILING - DECEMBER 28, 1988

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FLORENCE AMOS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 17, 1987

For the Petitioner-Appellant, Klausner, Hunter and Oxfeld (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Reussille, Mausner, Carotenuto, Bruno and Barger (Martin Barger, Esq., of Counsel)

Petitioner in this case asserted entitlement to benefits under N.J.S.A. 18A:30-2.1, alleging that the Board had improperly charged her with sick leave for seven days' absence from work due to chicken pox.[1] Petitioner however did not file a claim with the Division of Workers' Compensation for benefits under the Workers' Compensation Act.

In his summary decision, the Administrative Law Judge (ALJ), relying on Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985), found that a prior determination of a compensable injury by the Division of Workers' Compensation is a prerequisite for consideration by the Commissioner of Education of a claim for benefits pursuant to N.J.S.A. 18A:30-2.1. Nonetheless, the ALJ recommended that Petitioner be recredited with accumulated sick leave on the grounds that the Board had not reduced leave credit in two other cases where teachers had contracted childhood illnesses.

The Commissioner adopted the ALJ's conclusion that Forgash precluded him from considering claims for benefits under N.J.S.A. 18A:30-2.1 absent a prior determination of compensability by the Division of Workers' Compensation. The Commissioner, however, rejected the ALJ's recommendation concerning restoration of Petitioner's credit, holding that the Commissioner will not render a determination under N.J.S.A. 18A:30-2.1 absent prior determination

---

[1] We note that the record indicates that although she was absent from work for seven days, the duration of her illness was nine days.

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by the Division of Workers' Compensation regardless of what the Board had done in cases of other teachers. The Commissioner therefore dismissed the petition, although without prejudice. We affirm.

Entitlement to benefits under N.J.S.A. 18A:30-2.1 turns on whether a teacher entitled to sick leave under the education laws is absent "as a result of a personal injury caused by an accident arising out of and in the course of his employment...." As set forth more extensively in Tompkins v. Board of Education of the Township of Hamilton, decided by the State Board, December 2, 1987, it is settled that the phrase "arising out of and in the course of employment" has precisely the same meaning under N.J.S.A. 18A:30-2.1 as it does under N.J.S.A. 34:15-7. Theodore v. Dover, 183 N.J. Super. 407 (App. Div. 1982). Consequently, the question of whether an injury arose out of and in the course of employment within the meaning of N.J.S.A. 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act.

Thus, in Tompkins, where petitioner had also filed a claim for benefits with the Division of Workers' Compensation and the question of whether her injury was work related was in dispute, the State Board held that although the Commissioner of Education has fundamental and indispensable jurisdiction over all disputes arising under the school laws, the exercise of such jurisdiction should be deferred pending determination by the Division of Workers' Compensation. In so holding, the State Board emphasized, as had the court in Forgash, supra, that the Division of Workers' Compensation was entitled to exercise primary jurisdiction over petitioner's claim in view of the "exclusive original jurisdiction" conferred on it with respect to claims for compensation arising under the workers' compensation statutes. The State Board also concluded, as articulated by the court in Forgash, that given the express function of N.J.S.A. 18A:30-2.1 to complement workers' compensation benefits, determination of petitioner's claim under N.J.S.A. 18A:30-2.1 prior to resolution by the Division of Workers' Compensation would result in supplanting the function of the compensation court.

In contrast to Tompkins, the record here provides no indication that Petitioner has filed a claim with the Division of Workers' Compensation.[2] However, in that Petitioner's entitlement to the relief she seeks under N.J.S.A. 18A:30-2.1 depends solely on whether her illness constitutes an injury arising out of and in the

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[2] We note, as did the ALJ, that notwithstanding Petitioner's argument that disability of less than seven days' duration is not cognizable by the Division of Workers' Compensation so as to enable petitioners suffering such disability to obtain a determination from that agency of whether the accident arose out of and in the course of employment, Petitioner's illness in this case was of nine days' duration, a period greater than the seven days beyond which compensation other than medical aid is payable under N.J.S.A. 34:15-14. See also N.J.S.A. 34:15-15 (pertaining to compensation for medical services).

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course of employment within the meaning of N.J.S.A. 34:15-7[3], we find that the same considerations apply so as to require prior determination by the Division of Workers' Compensation of whether her illness was work related.

In reaching this conclusion, we emphasize that Petitioner is asserting entitlement to restoration of sick leave credit on the basis of statute. Again, entitlement to the benefit mandated by N.J.S.A. 18A:30-2.1 requires that the illness she suffered constitute a work related injury within the meaning of N.J.S.A. 34:15-7. Accordingly, as the Commissioner concluded, the Board's alleged handling in the past of sick leave credit in the cases of two other teaching staff members does not excuse Petitioner from obtaining from the Division of Workers' Compensation a determination of whether her illness was work related.

For the reasons set forth above, we conclude that the Commissioner properly refrained from exercising jurisdiction in this case, and we affirm his decision to dismiss this matter without prejudice.

Attorneys exceptions are noted.
February 3, 1988

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[3] We note that in her appeal to the State Board, Petitioner concedes that there is "substantial precedent" for concluding that the contraction of juvenile infectious diseases is not compensable under the Workers' Compensation laws, at least at the assembly line. Petitioner's brief, at 9-10. Although, as set forth above, a conclusion that Petitioner's illness was not compensable under the workers' compensation laws would preclude benefits under N.J.S.A. 18A:30-2.1, this question was not briefed by the parties and we therefore make no judgment on this issue.

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BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MAYOR AND COUNCIL OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, November 16, 1987

For the Petitioner-Respondent, McOmber & McOmber
(J. Peter Sokol, Esq., of Counsel)

For the Respondent-Appellant, Shebell & Schibell
(Raymond P. Shebell, Esq., of Counsel)

This case arose when, following rejection of the budget submitted to the voters by the Board of Education of the City of Asbury Park, the City Council, in fixing the amount to be raised by local tax levy for 1987-88, reduced the amount originally submitted by $650,000. The Board then appealed to the Commissioner of Education pursuant to N.J.A.C. 6:24-7.1 et seq., arguing that the Council had failed to supply line item reductions and the reasons for the reductions when it acted to reduce the budget.

The Commissioner determined that the Council's failure to provide the Board with specific reasons for each of its current expense line item reductions when it certified the 1987-88 school tax levy was violative of N.J.S.A. 18A:22-37. He therefore directed restoration of $650,000 for current expense purposes.

The City Council appealed to the State Board of Education. However, before briefing commenced, the parties submitted to the State Board a proposed settlement of the matter.

The proposed settlement provides that the Board of Education of the City of Asbury Park, pursuant to resolution adopted January 21, 1988, will agree to settlement of the dispute with restoration of $350,000 to be made by the City Council. The City Council in turn restored the sum of $350,000 in accordance with its resolution adopted January 20, 1988, and agrees to withdraw its appeal to the State Board with prejudice, providing that the Commissioner of Education enters an order approving the settlement.

Neither the proposed settlement nor the resolutions adopted by the Board and the Council include anything more pertaining to the budget other than the lump sum amount proposed to be restored and

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the total amount proposed to be certified for current expenses for 1987-88. Noticeably absent is any indication of the line items that would be affected by what, under the terms of the settlement, would be a $300,000 reduction of the budget originally submitted.

Quite simply, in contrast to the budget originally proposed by the Board, see N.J.S.A. 18A:7A-28, or an amount properly fixed by a governing body following rejection by the voters, see N.J.S.A. 18A:22-37, there is no assurance in the proposed settlement that the resulting budget would insure the provision of a thorough and efficient education to the students in the District. Given the responsibility of the State Board of Education in assuring the provision of a thorough and efficient education to the children of this state, we find that we can not approve settlement of the matter as it is proposed in this case.

Moreover, under the terms of the proposed settlement, withdrawal of the appeal by the Council is contingent on the entry of an order by the Commissioner of Education approving the settlement. Such approval is within the purview of N.J.A.C. 6:24-7.6, and we therefore remand this matter to the Commissioner of Education for the purpose of scheduling by him of a conference attended by the parties to be conducted by the County Superintendent. N.J.A.C. 6:24-7.6. Proceedings in the Council's appeal to the State Board are stayed pending the outcome of such conference and any further proceedings under N.J.A.C 6:24-7.6 as are necessary to resolve this matter.

March 2, 1988

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MICHAEL DREHER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 22, 1981

Decided by the State Board of Education, July 6, 1983

Remanded by the Appellate Division, February 28, 1985

Remanded by the State Board of Education, July 3, 1985

Decided by the Commissioner of Education, July 29, 1987

Decision on motion by the State Board of Education, December 2, 1987

For the Petitioner-Appellant, Michael P. Dreher, pro se

For the Respondent-Respondent, Margulies, Wind, Herrington and Katz (Clifford Herrington, Esq., of Counsel)

The question in this case is whether Petitioner-Appellant Michael Dreher acquired tenure as a principal with the Respondent Board. The matter is before the State Board by virtue of appeal from the decision of the Commissioner of Education rendered pursuant to remand by the Appellate Division for the purpose of permitting Petitioner to challenge the effect of prior stipulation that he was employed as a principal on a ten month basis and to prove that he accepted a constructive offer of employment as principal in writing prior to June 1, 1978.

Following consideration of the documentary evidence and the testimony of the witnesses, the Administrative Law Judge (ALJ) concluded that, based on the relevant collective negotiations agreements and the testimony of witnesses in regard to those agreements, Petitioner held a ten month position during 1976-78, and had only been employed two academic years so that he did not acquire tenure as a principal based on his employment during 1976-78. He further found that Petitioner had failed to establish that the Board received an acceptence letter from him or that he had adequately notified the Board of acceptance of employment as a principal for

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1978-79 in writing in conformity with N.J.S.A. 18A:27-12. The ALJ therefore recommended dismissal of the petition.

Following review of the controlling statutes and consideration of the record, the Commissioner concluded that nothing in the record supported Petitioner's claim to tenure as a principal. The Commissioner further concluded that review of the relevant testimony showed that Petitioner had failed to establish receipt by the Board of an acceptance letter or that he had adequately notified the Board of such acceptance. Accordingly, the Commissioner adopted the findings and conclusions of the Administrative Law Judge and dismissed the petition. The Commissioner however directed the Board to comply, commencing with 1987-88, with N.J.S.A. 18A:27-5 and N.J.S.A. 18A:27-6 with regard to the issuance of individual contracts for employment of non-tenured administrators and supervisors.

On appeal, Petitioner offers further argument that he was a twelve month employee and that he did in fact mail an acceptance letter to the Board. We, like the Commissioner, have reviewed the entire record in this matter and, for the reasons expressed therein, affirm the decision of the Commissioner of Education. In affirming that decision, we note that N.J.S.A. 18A:27-5 and N.J.S.A. 18A:27-6, upon which the Commissioner based his directive concerning the issuance of individual contracts to non-tenured administrators and supervisors, controls employment contracts between teaching staff members and the employing board where no rules governing such employment have been adopted by the board. Thus, we concur with the Commissioner that to the extent that the Board of Education of the City of Jersey City has not adopted rules governing the employment of its administrators and supervisors, it has a statutory obligation to issue individual employment contracts conforming with the requirements of N.J.S.A. 18A:27-5 and N.J.S.A. 18A:27-6.

January 6, 1988

Pending N.J. Superior Court

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IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF EWING,	:	DECISION ON MOTION
MERCER COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 6, 1987

Decision on motion by the Commissioner of Education, April 13, 1987

Decision on motion by the State Board of Education, July 1, 1987

Remanded by the State Board of Education, August 5, 1987

Decision on remand by the Commissioner of Education, October 21, 1987

Decision on motion by the Commissioner of Education, December 8, 1987

For the Petitioner-Appellant, David W. Carroll, Esq.

For the Respondent-Respondent, Greenberg and Prior (James F. Schwerin, Esq., of Counsel)

We today determine whether to dissolve a stay granted by the Commissioner, staying any obligation the Board of Education of the Township of Ewing may otherwise have had to pay Respondent John Eberly back salary awarded him by virtue of the Commissioner's decision dismissing tenure charges against him pending the outcome of the Board's appeal of that decision. In that the issues raised by Respondent relate to the effect of the Commissioner's decision in the underlying case, as well as implicate prior procedural determinations made in this matter, review of the determinations made thus far is called for.

The underlying case involves tenure charges of improper sexual conduct against Respondent, a tenured social studies teacher employed since 1969 by the Board of Education of the Township of Ewing. On March 6, 1987, the Commissioner of Education, deferring to the Administrative Law Judge's credibility assessments, adopted with supplementation the ALJ's recommended decision, finding that the charge was not supported by a preponderance of credible evidence.

The Board appealed the Commissioner's decision to the State Board of Education and also sought a stay from the Commissioner of both his directive to reinstate Respondent and his order directing

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payment of back salary. On April 13, 1987, the Commissioner denied the stay, but construed N.J.S.A. 8A:6-14 to permit a district board to continue suspension during the pendency of appeal of a Commissioner's decision dismissing tenure charges. The Commissioner, however, further construed the statute so as to require payment of back salary for the period of initial suspension upon dismissal of the charges by the Commissioner.

On July 1, 1987, the State Board of Education granted the Board's motion for stay of the Commissioner's directive that required payment to Respondent of back salary for the first 120 days of his suspension and for a one month delay attributable to Respondent, and denied Respondent's cross-motion seeking immediate reinstatement. In making this determination, the State Board did not explicitly address the Commissioner's construction of N.J.S.A. 18A:6-14.

On August 5, 1987, the State Board considered the merits of the underlying case, finding that the Commissioner had failed to apply the proper standard of review when he decided the matter. The State board therefore remanded the case to the Commissioner for review under the appropriate standard.

On October 21, 1987, the Commissioner rendered his decision pursuant to our remand, adopting the Administrative Law Judge's determination and directing dismissal of the charges with prejudice. The Commissioner further directed Respondent's reinstatement to his former position with all back pay withheld, fringe benefits, annual salary and/or adjustment increments, and specifically directed restoration of Respondent's increments that had been withheld during the pendency of the proceedings.

The district Board then appealed the Commissioner's decision to the State Board, and that appeal is currently pending. The Board also sought from the Commissioner a stay of that portion of his decision on remand that directed payment of back salary to Respondent. On December 8, 1987, the Commissioner granted the Board's motion, relying on the State Board's prior determination of July 1, 1987.

Respondent seeks from the State Board dissolution of the stay of payment of back salary. In seeking dissolution of the stay, Respondent further seeks a ruling from the State Board that, in the absence of a stay, he is entitled at this juncture to all relief granted him by virtue of the Commissioner's decision on remand, including immediate reinstatement. Although the issues raised by Respondent extend beyond the scope of the stay granted by the Commissioner, insofar as Respondent has raised questions related to the proper construction of N.J.S.A. 18A:6-14, we have determined to address those issues in order to clarify Respondent's entitlements during the pendency of the Board's appeal.

Essentially, Respondent contends that because N.J.S.A. 18A:6-25 provides that a Commissioner's determination of a dispute arising under N.J.S.A. 18A:6-9 is binding unless and until reversed,

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in the absence of a stay, the Commissioner's decision dismissing the charges in this case must be given immediate effect so as to now entitle him to all relief afforded by that decision. He urges that the language of N.J.S.A. 18A:6-14 supports this conclusion. Respondent further argues that the circumstances here do not justify staying the Commissioner's decision on the merits so that he now should be afforded the benefit of that decision, including immediate reinstatement.

We reject Respondent's contention that the district Board, in the absence of a stay granted by the Commissioner, is without authority to continue Respondent's suspension during the pendency of its appeal to the State Board of Education. N.J.S.A. 18A:6-14 provides that:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

By its terms, N.J.S.A. 18A:6-14 expressly authorizes a district board to suspend a person against whom tenure charges are made upon certification of the charges to the Commissioner, and confers on the district board the authority to determine whether suspension is with or without pay. In contrast to its predecessor, N.J.S.A. 18A:6-14, L. 1960, c. 136; see Statement accompanying Assembly Bill No. 104 (January 12, 1960), the current statute limits the district board's discretion in relationship to salary payment by mandating that payment of full salary begin on the one hundred and twenty-first day after suspension in the event the Commissioner has

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not made a determination of the charges. In further contrast to its predecessor, the statute addresses cases in which appeal from a Commissioner's determination of the charges is taken, and specifically mandates that salary payment be continued where suspension is continued during an appeal from a determination dismissing the charges.

We find nothing in the language of N.J.S.A. 18A:6-14 that deprives the district board of the authority granted by the statute to determine whether or not to suspend an individual who is the subject of charges pursuant to the Tenure Employees Hearing law, N.J.S.A. 18A:6-10 et seq., where suspension is continued during the pendency of appeal. In that respect, we recognize that the language of current statute differs from its predecessor in that, in contrast to its predecessor, N.J.S.A. 18A:6-14 does not, in its mandate for reinstatement with full back salary from first day of suspension in the event the charges be dismissed, specify that the mandate is effective upon "final" determination. However, given that the subsequent provisions of the current statute specifically address cases in which appeal is taken, we can not read that mandate as requiring reinstatement with back pay for the period of initial suspension where the Commissioner's dismissal of the charges is appealed.

Quite simply, the language of N.J.S.A. 18A:6-14 authorizes a district board to suspend an individual upon certification of charges and permits the district board to continue the suspension during the pendency of an appeal from dismissal of the charges by the Commissioner, although requiring that payment of salary begin on the one hundred and twenty-first day and continue thereafter. We find that the language reflects the intent and purpose of N.J.S.A. 18A:6-14

> ...to alleviate the financial plight of those affected [by tenure proceedings] by providing for payment of their full salary (less somes received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal.

In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 38 (App. Div. 1974).

In light of that purpose, as reflected in the words of the statute, we conclude that, in the face of continuation of his suspension by the Board, Respondent is not entitled by virtue of the Commissioner's decision to reinstatement during during the pendency of the Board's appeal.

We now turn to the effect of N.J.S.A. 18A:6-14 on Respondent's entitlement to now receive the monetary relief awarded by the Commissioner. In accord with the purpose of the statute,

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N.J.S.A. 18A:6-14 specifies the monetary entitlements during the pendency of proceedings of individuals who are the subject of tenure charges. We conclude that N.J.S.A. 18A:6-14 therefore is controlling of Respondent's entitlement to salary payments, including back pay, during the pendency of the Board's appeal in this case. We find that while Respondent must continue to receive during the pendency of appeal the salary payments that commenced by operation of the statute on the one hundred and twenty-first day following certification of the charges, he is not entitled to payment of back salary for the initial period of his suspension at this juncture.

Again, the words of N.J.S.A. 18A:6-14 are explicit. Those words authorize initial suspension with or without pay. They direct that payment of full salary begin on the one hundred and twenty-first calendar day following certification of charges. That calculation of time, however, specifically excludes all delays granted at the request of the person who is the subject of the charges. Further, in mandating that payment of full salary begin, the Legislature specifically excluded payment for the first one hundred and twenty days of suspension. Although the statute requires payment of full salary if suspension is continued during an appeal from dismissal of the charges, the mandate specifically is that "...full pay or salary ... shall continue." Thus, although the statute provides for full pay from the first day of suspension where suspension is ended by virtue of reinstatement, we find no basis for concluding that "full salary" as mandated where suspension is continued is anything but continuation of the salary payments begun on the one hundred and twenty-first day following certification of the charges.

Finally, we conclude that Respondent has no entitlement by virtue of the Commissioner's decision to receive during his suspension a salary amount that includes an award of increments. In the Matter of the Tenure Hearing of Anthony Castaldo, decided by the State Board, July 2, 1986. In so concluding, we emphasize in mandating payment of full salary, N.J.S.A. 18A:6-14 does not provide for automatic raises from year to year while litigation is in progress. In that increments are intended to reward only those who have contributed to the educational process, Bd. of Education of Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979), the mandate of N.J.S.A. 18A:6-14 can not be construed as conferring an entitlement to automatic raises during suspension.

In this respect, we emphasize that although the Commissioner dismissed the charges against Respondent, the State Board of Education has not yet considered the merits of the case. In the event that Respondent ultimately prevails, he would be afforded such relief as is necessary to make him whole, including back pay for the period of his initial suspension and retroactive restoration of increments. However, as set forth above, we find that the statutory language does not entitle him to receive such relief during the pendency of the appeal.

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In sum, we conclude that N.J.S.A. 18A:6-14 is controlling of Respondent's entitlements to reinstatement and payment of salary during the pendency of the Board's appeal. We find that the language of the statute authorizes the Board to continue suspension during the appeal and, while mandating continuation of payment of full salary, does not require that the Board at this juncture pay him back salary for the period of his initial suspension. Nor does the statute, in mandating continuation of payment of salary, require the Board to pay him now amounts representing increments for the period of his suspension.

We have today construed the provisions of N.J.S.A. 18A:6-14 so as to establish Respondent's financial and employment entitlements during the pendency of the Board's appeal. While our conclusions are based on the language of the statute, we find that such construction effectuates the purpose of the statute to alleviate the financial plight of those who are subject to tenure proceedings. Such construction at the same time recognizes that giving binding effect to dismissal of tenure charges prior to the final agency decision on the merits of those charges may negatively impact the educational process and unnecessarily place students at risk. In that an individual who ultimately prevails may be afforded such relief so as to make him whole, we find the balance reflected in the statute properly accommodates both the interests of the individual who is the subject of tenure proceedings and those of the educational system and the students.

In light of our conclusions concerning Respondent's entitlements during the pendency of the Board's appeal, we decline to dissolve the stay granted by the Commissioner in this case.

March 2, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN EBERLY, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF EWING,	:	DECISION
MERCER COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 6, 1987

Decision on motion by the Commissioner of Education, April 13, 1987

Decision on motion by the State Board of Education, July 1, 1987

Remanded by the State Board of Education, August 5, 1987

Decision on remand by the Commissioner of Education, October 21, 1987

Decision on motion by the Commissioner of Education December 8, 1987

Decision on motion by the State Board of Education, March 2, 1988

For the Petitioner-Appellant, David W. Carroll, Esq.

For the Respondent-Respondent, Greenberg and Prior (James F. Schwerin, Esq., of Counsel)

This case presents a complex sequence of events culminating in a tenure charge of improper sexual contact against John Eberly, a tenured social studies teacher who had been employed by the Ewing Township Board of Education for almost sixteen years. The charge, as certified by the Board on September 30, 1985, alleged that "during the year 1983 while acting in the capacity of Big Brother, John Eberly on several occasions had indecent sexual contact with S., a twelve year old boy under his charge." The complaint against Respondent originated with the boy's mother, P.M., and the charge was supported by a probable cause affidavit and an investigative report pertaining to criminal charges upon which, in lieu of prosecution, the Bucks County District Attorney's Office offered and Respondent consented to entry into Pennsylvania's Accelerated Rehabilitative Disposition Program (ARD).

The conduct underlying the charge allegedly occurred during the course of Respondent's relationship with S.M., a Pennsylvania resident, which began in March 1982, when S.M. was matched with

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Respondent as part of the Big Brothers program. Although the exact sequence of events is in dispute, the allegations that formed the basis of both the criminal charges and the tenure charge were first made by S.M. in response to inquiries, both direct and indirect, initiated by his mother concerning the possibility that improprieties may have occurred during the course of his relationship with Respondent. On the basis of S.M.'s allegations, his mother requested termination of the Big Brother relationship in August 1983. This, in turn, triggered investigation of the allegations by the Bucks County Children and Youth Services (C & Y), and ultimately criminal investigation by the Bucks County District Attorney's Office, on the basis of which the criminal charges were brought. As indicated, the District Attorney's Office offered Respondent entry into the ARD program in lieu of prosecution when, immediately prior to hearing, S.M. declined to testify and, without knowledge of this, Respondent consented to participation in the program.

During the course of the inquiries and investigation, S.M. was questioned with varying specificity by a number of individuals concerning his relationship with Respondent. Thus, in addition to S.M.'s testimony and deposition, the record before the Administrative Law Judge (ALJ) included testimony and documentary evidence pertaining to what S.M. had told those individuals. Among those individuals were S.M.'s mother, P.M., Leslie McGrath, a case worker for Big Brothers, Stephen Battershell, the detective responsible for the criminal investigation, and Dr. Sohn, a psychologist who had counseled S.M. for motivational and emotional problems both before and after the period when the alleged incidents occurred. Detective Battershell and Detective Harry Armitage, the detective who administered a polygraph test to Respondent during the course of the criminal investigation, also testified concerning admissions purportedly made by Respondent before and after administration of the polygraph test, and their reports pertaining to those admissions also were admitted into evidence.

In his defense, Respondent offered his own testimony, that of Dr. Raymond Reinhart, the psychiatrist who treated him from November 1983 until June 1984, the testimony of a former Little Brother, Rich Ghidro, and Ghidro's mother, as well as that of Scott Poland, a friend of Ghidro's, and that of numerous character witnesses.

Considering the total record before him, the ALJ found that this case turned on an assessment of the credibility of the witnesses. Having observed the witnesses, the ALJ found that the testimony of P.M., S.M. and Detective Armitage was not credible. His finding with regard to S.M. and P.M. was based on his observation of their demeanor, as well as inconsistencies and contradictions in their testimony. With respect to the post-polygraph admissions purportedly made by Respondent, the ALJ found that Detective Armitage had not successfully explained why the post-polygraph consent form had not been signed, and that Respondent's testimony concerning the purported admissions was more credible than that of Detective Armitage. Therefore, the ALJ

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concluded that the Board had failed to carry its burden to establish by a preponderance of the reliable and credible evidence that the charge against Respondent was true, and recommended that the charge be dismissed with prejudice.

Pursuant to remand by the State Board of Education[1], the Commissioner conducted an independent review of the entire record. Based on that review, the Commissioner adopted the ALJ's credibility determinations, explicitly detailing in his decision the basis upon which he concurred with the ALJ's determinations in that regard. Emphasizing the difficulties involved in evaluating testimony and evidence where there were no independent eyewitnesses to the alleged incidents, the Commissioner, like the ALJ, concluded that the Board had failed to meet its burden, and he directed dismissal of the charge with prejudice.

By its appeal, the Board challenges the credibility determinations made by the ALJ and Commissioner, asserting that review of the record as a whole supports the conclusion that S.M.'s allegations are true and that Respondent's denials are not credible.

The charge against Respondent is a serious one. Although the conduct alleged did not occur in the context of Respondent's employment within the New Jersey public school system, such conduct, if it in fact occurred, would constitute an unacceptable departure from that expected of a teacher and a violation of the public trust placed in Respondent as a teacher. e.g., In the Matter of the Tenure Hearing of Ernest Tordo, 1974 S.L.D. 97-98. However, while the quantum of proof required in administrative proceedings such as these is not, as in a criminal proceeding, proof beyond a reasonable doubt, determination as to whether the charges are true in fact must nonetheless be supported by a preponderance of believable evidence. In the Matter of the Tenure Hearing of Barry F. Deetz, decided by the State Board, November 7, 1984, aff'd Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986).

As indicated, the testimonial and documentary record in this case is extensive, covering seven days of hearing and including 45 documentary exhibits. In that the Board's appeal essentially challenges the credibility determinations upon which the ALJ's and the Commissioner's ultimate conclusion rests as to Respondent's guilt, and in view of the State Board of Education's responsibility as the ultimate administrative decision maker in this case, Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452-53 (1982), we have reviewed thoroughly the entire record in this matter and have considered all arguments made by the parties in their briefs in order to ascertain whether the proofs in this case substantiate the Board's charge by a preponderance of credible evidence. Based on

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[1] See In the Matter of the Tenure Hearing of John Eberly, decided by the Commissioner, March 6, 1987, rev'd and remanded by the State Board, August 5, 1987.

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our review, we can not avoid the conclusion that, because both S.M.'s testimony and the evidence offered in corroboration are suspect with regard to the truth of the allegations, the charge in this case is not supported by a preponderance of credible evidence.

In arriving at this conclusion, we recognize that we are not required to adopt the ALJ's assessments of the substance of the witnesses' testimony, nor his evaluation of objective factors bearing on credibility. Deetz, supra. In reviewing those assessments in light of the record, we, however, have accorded due consideration to the fact that the ALJ had the opportunity to observe the parties and their witnesses, and, in this case, specifically referenced the demeanor of S.M. and P.M. at hearing in arriving at his conclusion that their assertions were not to be believed. See Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (App. Div. 1962).

Although we did not have the opportunity to observe the witnesses, our review of the substance of the testimony, as well as the objective factors bearing on credibility, have led us to conclusions that are entirely consistent with and reinforced by the ALJ's observations of the demeanor of the Board's witnesses. In that substantiation of the charge here turns largely on the credibility accorded to S.M., we have carefully reviewed his testimony as it relates to that offered by the Board to corroborate the truth of his allegations. Based on that review, we find inconsistencies in S.M.'s version of what occurred and major contradictions between his testimony and that of his mother of such nature as to raise serious questions concerning S.M.'s credibility regarding whether improper sexual contact occurred in this case.

At hearing, S.M. testified that one or two months into his relationship with Respondent, while taking a shower at Respondent's house, Respondent leaned fully clothed into the shower and washed S.M.'s back, neck, "butt", legs and testicles. Tr. 5/15/86, at 130-31, 149, 177. He testified that this was repeated five or six times, id. at 131,132, 153, both at his house and at Respondent's house, always in the same way.

S.M. also testified that on two occasions, Tr. 5/15/86, at 153, 162, 179, Respondent put his hands under S.M.'s shorts and touched his penis late at night while S.M. was sleeping in a sleeping bag on a mattress in Respondent's room. Id. at 133-34. S.M. further testified with specificity that every time he read to Respondent, he, on Respondent's instruction, sat on Respondent's lap and that Respondent would put his hand on top of S.M.'s pants, on S.M.'s penis. Tr. 5/15/86, at 145-46, 150-51.

In response to questions concerning whether Respondent gave him rubdowns, S.M. first testified that Respondent "might have," but that he was "not sure." Tr. 5/15/86, at 146. On cross-examination, he testified that he did not remember anybody giving him a rubdown, but that he remembered telling somebody about it. Id. at 153. Additionally, when asked, S.M. testified that Respondent had not

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taken any nude pictures of him, and that he didn't think that he had ever told anyone that. Id. at 152.

As to the sequence of events surrounding the inquiry initiated by his mother, S.M. testified that, in response to her direct inquiry after she had observed Respondent follow him into the bathroom at S.M.'s house in July or August 1983, Tr. 5/15/86, at 152, 154, 176, he told his mother everything that had happened in relationship to Respondent's conduct in washing him, and had recounted all the times it had happened. Tr. 5/15/86, at 136, 152, 157-58.

S.M.'s testimony at hearing concerning the incidents of alleged touchings in the shower and under the sleeping bag is generally consistent with his testimony at deposition. R-9, in evidence. His testimony regarding the circumstances under which he told his mother what had happened is also consistent with that at deposition, other than a discrepancy in whether her observation of Respondent following him into the bathroom and initial inquiry occurred in July or August 1983.

However, his testimony at deposition with regard to whether Respondent had given him rub-downs is not consistent with that at hearing. In contrast to his testimony at hearing that Respondent "might have" given him rub-downs, but that he did not remember anyone giving him rubdowns, at deposition he testified with some specificity that Respondent had given him rubdowns "once or twice." R-9, in evidence, at 29-30.

S.M.'s deposition testimony concerning reading sessions with Respondent is also at variance with his testimony at hearing in that at hearing he recounted that the sessions involved reading to Respondent, while at deposition he stated that the incidents occurred while Respondent was reading to him. R-9, at 50. Tr. 5/15/86, at 145. Although not inconsistent as to generally what physical contact occurred, at hearing S.M. testified that Respondent's hands were on his penis, while at deposition he testified that Respondent's hand would be on his "private parts." R-9, in evidence, at 50. A difference in connotation is reflected in his deposition testimony in that he testified at deposition that he had no complaint about reading with Respondent, that Respondent didn't "really touch" him, but "just had his hand resting there," id. at 51-52, and that consequently he did not tell anyone about this since he didn't think Detective Battershell "would need that information." Id.

Although S.M. testified at various points both at hearing and at deposition that he did not remember what he had told various individuals, Tr. 5/15/86, at 42, 152, 153, 161-62, 164; R-9, in evidence, at 47, 52, the record includes reports, records and testimony of individuals with whom S.M. spoke concerning his allegations. We have no reason to doubt the credibility of the Board's witnesses as it pertains to the veracity of their testimony with respect to what S.M. told them concerning what had happened

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between himself and Respondent. Consideration of that evidence shows further inconsistencies and presents a shifting story.

The first individual, other than his mother or younger brother, to whom S.M. related what had occurred was Leslie McGrath, a caseworker employed by Big Brothers. Both her report, P-1, in evidence, and testimony indicate that S.M. told her that Respondent sometimes came into the bathroom to help him wash and sometimes, or usually, he woke up in Respondent's bed. Tr. 5/15/86, at 58. S.M. told Ms. McGrath that he put on his own underwear when Respondent helped him dress, id. at 60, and, when asked, responded that nothing unusual might have occurred when he slept in Respondent's bed. Id. at 54. When asked if anything else had occurred or whether there was anything else they should know, S.M. replied no. Id. at 60.

Although the C&Y investigator, Cindy Kowalewski, did not testify, her report, P-5, in evidence, states that Respondent allegedly showered S.M. on at least two occasions touching his "privates" with soapy hand, on more than one occasion completely undressed him, that S.M. slept in Respondent's bed on more than one occasion and would usually wind up in Respondent's bed, and, specifically, that when questioned, S.M. recalled Respondent giving him back rubs, messaging not only his back but also his buttocks.

To Detective Battershell in December 1983, S.M. recounted that Respondent had washed him on several occasions and had fondled his "private parts," Tr. 5/16/86, at 114, and that on one occasion, Respondent had physically removed all his clothes, id., and had washed his "privates." Id. at 115. He recounted waking up in Respondent's bed, id. at 117, and, additionally, recounted that Respondent had placed his hand under S.M.'s pants touching his penis while he slept on the mattress to "check for fever." Id. at 117. In contrast to S.M.'s testimony at hearing, according to Detective Battershell's report and testimony, S.M. recounted to him that this had occurred three times a week. P-6. in evidence; Tr. 5/16/86, at 165-66, 196-98. See id. at 198, 191.

In December 1983, when he was again in counseling with Dr. Sohn, S.M. recounted to him that Respondent had fondled his genitals, undressed him, washed him in the shower and photographed him in the nude. Tr. 5/20/86, at 96, 102-03; R-5, in evidence.

As set forth in both the ALJ's and the Commissioner's decisions, there are major conflicts between S.M. and P.M.'s testimony pertaining to when and under what circumstances S.M. revealed to his mother alleged improprieties in his relationship to Respondent. P.M. testified that she first questioned S.M. when she observed Respondent follow S.M. into the bathroom in the spring of 1983, Tr. 5/15/86, at 37-39, but that S.M. communicated to her that Respondent washed him following indirect inquiries in August. Tr. 5/15/86, at 43, 84-85, 101-02. According to P.M., upon her direct inquiry in August, S.M. told her that Respondent had washed him "and things" but did not want to talk about it further. Tr. 5/15/86, at 48-105. In contrast, S.M. consistently maintained at hearing that the shower incident observed by his mother occurred in July or

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August 1983, at which time, upon her direct inquiry, he told her all that had happened.

The inconsistencies detailed above pertain to incidents occurring during S.M.'s eighteen month relationship with Respondent that, if true, might constitute, as charged, improper sexual contact. However the lack of consistency in S.M.'s version of what actually occurred during the relationship, the variations in the substantive allegations he made at various points and the major contradictions between his testimony and that of his mother with regard to the single concrete incident that assertedly caused P.M. the concern leading to her inquiries raise serious questions regarding the credibility of S.M.'s testimony. His credibility is rendered further suspect by his failure to remember at hearing incidents he had previously alleged to have occurred, which, had they occurred, would have been significant given the nature of the charge.

As found by both the ALJ and Commissioner, consideration of the objective factors bearing on S.M.'s credibility raise even more questions concerning the veracity of his testimony at hearing with regard to the allegations. S.M.'s passivity and the role played by his mother, both generally and as initiator in this context, are well documented in the record. The fact that S.M.'s younger brother was the subject of abuse in the summer of 1982 and that S.M. was cognizant of this and to some extent witness to this is likewise established in the record. The significance of this in assessing S.M.'s credibility is reinforced by the similarity between incidents involving his brother and the incidents of showering as alleged by S.M. Tr. 5/15/86, at 98-99. The import of these circumstances is further demonstrated by the fact that S.M. communicated his apprehension to Leslie McGrath that the same thing that happened to his brother might happen to him. Tr. 5/16/86, at 57; P-1, in evidence. Viewing in this context the shifts and inconsistencies in S.M.'s allegations with respect to what occurred, we conclude that S.M.'s testimony is not reliable so as to permit a finding of guilt on that basis. In that regard we emphasize that although corroboration of student testimony is not necessarily required, it has long been established that student testimony, including that of teenagers, must be examined with great caution. e.g., Deetz, supra; In the Matter of the Tenure Hearing of Nathan James Michaels, decided by the Commissioner, January 30, 1984, aff'd by the State Board, September 5, 1984; In the Matter of the Tenure Hearing of Portia Williams, decided by the Commissioner, August 27, 1981, aff'd by the State Board, March 24, 1982, aff'd Docket #A-4036-81T3 (App. Div. Dec. 15, 1982).

Based on our review of the record as a whole, we are struck by the fact that, although the record is extensive, independent evidence offered in corroboration of the charge is sparse. Aside from P.M.'s testimony that she observed Respondent follow S.M. into the bathroom on one occasion, the only other independent evidence offered in support of the charge are purported admissions made by Respondent after administration of a polygraph test during the criminal investigation.

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After careful examination of those admissions and the testimony pertaining to the circumstances under which they were made,[2] we find that they do not provide a basis upon which to substantiate the charge here. Prior to administration of the polygraph test on February 15, 1984, in preparation for which Detective Armitage "went over the case" with Detective Battershell, Tr. 5/20/86, at 34[3], Detective Armitage, following his standard procedures, conducted a pre-test interview, at which time Respondent signed the pre-test portion of the consent form. Tr. 5/20/86, at 16-21. P-19, in evidence; P-21, in evidence. Detective Armitage testified that following a 20 minute test, he advised Respondent that he believed him deceptive on the examination, Tr. 5/20/86, at 27, and further testified that he did not make any threats or promises to Respondent. Id. at 29. However, testifying that signatures following the test are routinely obtained, Tr. 5/20/86, at 32, he further testified, without explanation, that signatureswere not obtained in this instance. Id. Further, Detective Armitage testified that, although Respondent's attorney was present during the pre-test interview, his attorney was not present during the post-test period. Id. at 33. It was Detective Armitage's testimony that during the post-test interview, when he advised Respondent as to the results, as was his routine, id. at 35, without threats or advice, Respondent gave a second account, which included purported admissions and which Detective Armitage believed corroborated his findings. Id. at 36-39. See P-21, in evidence.

Detective Battershell met with Respondent the next day, February 16, 1984. Testifying exclusively from his report, Tr. 5/16/86, at 138, Battershell repeated the substance of the report, id. at 139-141; P-10, in evidence, which also included purported admissions.

As detailed by the ALJ, Initial Decision, at 17-18, Respondent testified that Detective Armitage badgered, pressured and coerced him, although he was in such a state that he did not remember his responses. Tr. 5/19/86, at 18-20; 21-22; 34; 39-42 48-49. As to the post-test responses recorded in Detective Armitage's polygraph report, P-21, in evidence, Respondent testified that some of the specific language reflected things he recalled

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[2] We note that, although the Commissioner indicated in his decision that the absence of Respondent's signature on the consent form was "fatal to the admissibility of any testimony or evidence concerning that portion of the test," Commissioner's decision, at 11, the testimony and documentary evidence pertaining to the post-test interview were admitted into the record, and findings were made by the ALJ as to Detective Armitage's testimony. Initial Decision, at 23.

[3] We note that Detective Armitage's testmony on this point directly conflicts with the implication conveyed by the Board in its statement of facts in its brief on appeal that Detective Armitage "had no prior contact with the case." See Board's brief, at 19.

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Detective Armitage saying to him. Tr. 5/21/86, at 161-162; 164. As to his meeting with Detective Battershell the next day, Respondent recalled only the question about things he had bought S.M. Id. at 166.

It is well documented in the record that, although somewhat improved from his condition when he first sought psychiatric treatment for major depression in November, Tr. 5/21/86, at 154, Respondent was taking, in addition to his regular medication for diabetes and high blood pressure, an anti-depressant, anti-depressant/anti-stress medication and a daily sleeping pill. e.g., id. at 154-55; Tr. 5/19/86, at 67-69, 71-73, 75. Dr. Reinhart testified that Respondent was unnerved by what had transpired, Tr. 5/19/86, at 56, and that he brought with him a handwritten note that, whether copied or from memory, is a short synopsis of what Respondent understood had been attributed to him during the post-test period. R-2, in evidence. While not of significant probative value, we note that the printing and punctuation are consistent with Dr. Reinhart's description of Respondent's condition at that time.

We fully concur with the ALJ that Respondent's testimony as to the post-test interview is to be credited and that Detective Armitage's testimony in this regard is not believable. As emphasized by both the ALJ and Commissioner, the post-test consent form was not signed despite Detective Armitage's testimony that this was routine procedure and his testimony indicating that in all other respects procedure was followed. We, like the ALJ, find it significant that no explanation for this departure was offered. Respondent was unaccompanied by counsel at this point, was in a depressed condition and was under medication. Armitage's pre-test portion of the report contrasts strongly in specificity and clarity with the post-test portion. The words "for showing love" appear only in this document, raising questions concerning whether Respondent ever made these statements, and we find Respondent's testimony on this point credible. To the extent that these "admissions" were made by Respondent, we find that the circumstances were as described by Respondent. Finally, Respondent's responses concerning whether he fondled S.M.'s genital area, the only responses included in Detective Battershell's report that would have clearly indicated physical contact of a sexual nature, were not responsive to what he was asked and make no sense. P-10, in evidence.

As recognized by the Commissioner, this case involves allegations concerning incidents to which there were no independent witnesses. Thus, as emphasized by the ALJ, resolution turns on the assessment of the credibility of the witnesses, in particular of S.M., P.M. and Detective Armitage. Based on our review, we have found that the record supports the credibility determinations made by the ALJ and adopted by the Commissioner on the basis of his own review.

Although we emphasize that Respondent in these proceedings does not bear the burden of establishing his innocence of the

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charge, he has been consistent in his denials of impropriety, and we find nothing in his testimony or in what he said at the meeting at Big Brothers to indicate that he had physical contact of a sexual nature with S.M. during the course of their relationship. In this regard, it must be emphasized that the relationship between S.M. and Respondent was that of Big Brother-Little Brother, and not that of teacher-student. Thus, although Respondent and S.M. were together during the course of their relationship in situations more intimate than would be appropriate in a teacher-student relationship, such intimacy in this context is not suggestive of impropriety.

Given the nature of the relationship, the fact that Respondent undressed S.M. and forced him into the shower, Tr. 5/21/86, at 128-33, P-1, in evidence, does not lead to an inference of improper sexual contact especially in light of the fact that S.M. apparently had some problems with personal hygiene. Tr. 5/21/86, at 129-32; Tr. 5/22/86, at 52. Nor does the fact that Respondent may have followed S.M. into the bathroom when he was helping him study on one occasion, Tr. 5/21/86, at 173, P-1, in evidence, or that he gave S.M. rubdowns, Tr. 5/21/86, at 134-38, 175-76, lead to an inference of impropriety. Further, as did the Commissioner, we find that Rich Ghidro's testimony concerning sleeping arrangements provides corroboration for Respondent's testimony in that regard. Tr. 5/22/86, at 51-52.

We also find that the credibility of Respondent's denial of any improper contact is reinforced by the fact that he had been employed by the Board as a teacher for almost sixteen years and had acted as a Big Brother for three other boys without any suggestion of impropriety in either context. Additionally, we find it not insignificant that Respondent has sustained his relationship with Rich Ghidro and both Ghidro and his mother testified in support of Respondent.

In sum, although the charge here is serious, we could not sustain it on the basis of the proofs presented in this case. While the Board has presented evidence that shows that S.M. made various allegations of impropriety to various individuals during the period of inquiry and investigation, the fact that he made the allegations, alone, does not substantiate the charge. Rather, as set forth above, the lack of consistency in S.M.'s version of what occurred over the course of the relationship, major contradiction with his mother's testimony as to a significant incident, the selectiveness of his recollections and his vagueness concerning significant detail combine with the objective factors bearing on his credibility so as to call into question the veracity of his allegations. Thus, we could not sustain the charge here on the basis of S.M.'s testimony without independent corroboration. As set forth above, we have found that the circumstances surrounding the admissions purportedly made by Respondent were such that they neither corroborate S.M.'s testimony nor provide independent substantiation for the charge.

Therefore, based on our review of the record, the State Board of Education affirms the determination of the Commissioner that the Board has failed to prove by a preponderance of credible

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evidence that Respondent had indecent sexual contact with S.M. while acting in the capacity of his Big Brother. Accordingly, we direct that the Board reinstate Respondent to his teaching position and, at this juncture, compensate him, in accordance with the Commissioner's decision, for all back salary owed him as provided by N.J.S.A. 18A:6-14.

July 6, 1988

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DR. JENNIFER FIGURELLI,	:	
PETITIONER-RESPONDENT.	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 11, 1986

Decided by the State Board of Education, May 6, 1987

Transferred by the Chancery Division, July 29, 1987

Remanded by the Appellate Division, December 3, 1987

For the Petitioner-Respondent, Russell J. Schumacher, Esq.

For the Respondent-Appellant, William A. Massa, Esq.

For the Intervenor, Ruhlman, Butrym and Friedman (Richard A Friedman, Esq., of Counsel)

This case is before the State Board of Education pursuant to remand by the Appellate Division and transfer of a related matter by the Chancery Division. Both matters involve the single question of whether Petitioner Jennifer Figurelli is entitled to employment by the Board of Education of the City of Jersey City as Assistant Superintendent of Pupil Personnel Services by virtue of our decision in the underlying case, rendered on May 6, 1987.

In the underlying case, Petitioner Figurelli challenged the abolishment of her position of Director of Pupil Personnel Services and her consequent transfer to a position as a school psychologist, effective January 6, 1986. She alleged that the Board's actions were in violation of her tenure and seniority rights, as well as the provisions of the settlement agreement disposing of prior litigation. See Figurelli v. Board of Education of the City of Jersey City, decided by the Commissioner July 23, 1984, aff'd by the State Board December 5, 1984, stipulation of dismissal, Docket #A-2034-84T7 (App. Div. December 18, 1985).[1]

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[1] This case involved Petitioner's transfer from the position of Director of Pupil Personnel Services to that of school psychologist in 1983. On appeal, the State Board affirmed the Commissioner's determination that Petitioner was entitled to reinstatement as Director. The Board appealed, but, as set forth above, that appeal was subsequently resolved by stipulation.

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In its decision of May 6, 1987, the State Board affirmed the Commissioner's determination, which, adopting the Administrative Law Judge's (ALJ) conclusion, found that abolishment of Petitioner Figurelli's position of Director of Pupil Personnel Services and her transfer to the position of school psychologist effective January 6, 1986, was in violation of Petitioner Figurelli's tenure rights. That conclusion was predicated on the determination that, based on the job description and the testimony, the duties of Petitioner's position of Director and those of the Assistant Superintendent of Pupil Personnel Services were substantially similar in nature. The relief that we directed in our decision was reinstatement to the senior administrative position for pupil personnel services from which Petitioner had been wrongfully transferred.

Following our decision, the Board appealed to the Appellate Division the determination that Petitioner Figurelli had acquired tenure in the position of Director of Pupil Personnel Services. Petitioner, in turn, sought enforcement of our decision by the Chancery Division in the form of an order directing her reinstatement as Assistant Superintendent.

At that point, Francis X. Falcicchio, who had been employed as Assistant Superintendent of Pupil Personnel Services since August 1985, moved to intervene in both the Chancery Division and Appellate Division proceedings. On July 29, 1987, the Chancery Division transferred the matter to the State Board for determination of whether the Board's placement of Petitioner complied with the State Board's ruling, and granted leave to Mr. Falcicchio to move to intervene in the proceedings before the State Board. On December 3, the Appellate Division granted leave to intervene to Mr. Falcicchio and remanded the matter for supplementation of the record.

By letter of December 21, we directed Intervenor to file application for the inclusion of the specific items with which he sought to supplement the record. We also requested certain information from Petitioner and the Board that we believed relevant to resolution of the Appellate Division's remand.

On January 5, 1988, Intervenor filed notice of motion to supplement the record and to reopen the matter for plenary hearing. By his motion to supplement, he seeks inclusion of his certification and that of his attorney, which generally pertain to the fact that Intervenor had not been notified concerning his right to participate. Included in his attorney's certification is the fact that Petitioner Figurelli was reinstated to the position of Director of Pupil Personnel Services subsequent to the Commissioner's decision in this case. Although opportunity for response was provided, neither Petitioner nor the Board filed any responsive papers in opposition to Intervenor's motion.

On January 20, 1988, the Board responded to our request for additional information by letter indicating that Petitioner had been reinstated as Director of Pupil Personnel Services on March 1, 1987. The Board also provided copies of Petitioner's certifications as Director of Pupil Personnel and School Psychologist, and

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indicated that she also possessed certification as a supervisor/principal. Included in the Board's submission were the job descriptions applicable to Petitioner when she served in the positions of Director of Pupil Personnel Services (1982) and School Psychologist (1979). Petitioner made no submissions in response to our request.

Initially, we grant that portion of Intervenor's motion that seeks supplementation of the record with the specific items submitted. It is clear to us that the facts set forth in those items are relevant in insuring that this case is fairly resolved in conformity with the principals of due process, and we observe that neither Petitioner nor the Board have opposed their inclusion.

However, our review of Intervenor's motion and the papers underlying the Chancery Division action has revealed that there is a misperception concerning the relief that we directed in our substantive decision in this case, and we have concluded that fairness to the parties requires that we correct such misperception by clarification of that decision. By the language of our decision, the State Board concluded that Petitioner Figurelli was

> ...entitled to reinstatement to the senior administrative position for Pupil Personnel Services <u>from which she was wrongfully transferred effective January 6, 1986.</u>

<u>Figurelli v. Board of Education of the City of Jersey City,</u> decided by the State Board, May 6, 1987, slip op. at 1 (emphasis added). That language affirmed the Commissioner's directive that Petitioner

> ...be reinstated forthwith to the senior administrative position for Pupil Personnel Services <u>whose duties were transferred</u> to the Assistant Superintendent position occupied by Mr. Falcicchio.

Commissioner's decision, at 32 (emphasis added).

Thus, neither the State Board's nor the Commissioner's decision directs Petitioner's employment as Assistant Superintendent. Nor did we intend to grant such relief. The language of our decision was based on our recognition that the particular position in which Petitioner Figurelli had served under the title of Director of Pupil Personnel Services had been variously designated as "Director," "Chief Administrator" and "principal assigned to the Bureau of Pupil Personnel Services." In refering to the position as the "senior administrative position," it was our intent to insure that Petitioner be reinstated to the position of Director of Pupil Personnel Services in which she had acquired tenure regardless of any subsequent change in title by the Board.

The supplementation of the record in this case indicates that the Board has not altered the title of the position, and has reinstated Petitioner as Director of Pupil Personnel Services.

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However, in light of the misperceptions reflected in these proceedings, we find it necessary to elaborate our reasoning with respect to the relief afforded by our decision.

We emphasize that the relief we granted was predicated on the determination that Petitioner had acquired tenure in the position of Director of Pupil Personnel Services, a position requiring certification as a supervisor and Director of Pupil Personnel Services. In turn, the conclusion that Petitioner's tenure rights were violated when the Board transferred her from that position in January 1986 was based on the determination that, although her position as Director had been abolished, the duties being performed by the Assistant Superintendent were substantially the same as the duties performed by Petitioner as Director.

Where, as here, the tenure rights of a teaching staff member are violated as a consequence of the assignment of the duties he performed to another position title despite purported abolishment of his position, the proper remedy is reinstatement to the position in which the member acquired tenure. See, e.g., Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949); Sampietro v. Board of Education of the Township of Ridgefield Park, decided by the State Board, November 5, 1986.

Quite simply, there is no entitlement under those circumstances to employment in a different tenurable position to which such duties may have been assigned. In this case, the certificates required for qualification to serve in the position title of Director of Pupil Personnel and that required for employment as an Assistant Superintendent are different so that there is no question that those positions are distinct for tenure purposes. That these positions are distinct for tenure purposes is further demonstrated by the fact that, in contrast to the position of Director, the position of Assistant Superintendent is a statutory office, see N.J.S.A. 18A:17-16; N.J.S.A. 18A:17-22, and is one of the positions specifically ennumerated in N.J.S.A. 18A:28-5. Again, Petitioner acquired tenure in the position of Director of Pupil Personnel Services and not in the position of Assistant Superintendent. There is, therefore, no basis upon which to afford her relief in the form of employment as Assistant Superintendent, notwithstanding that the Board's actions violated the rights she had acquired by virtue of achieving tenure as Director of Pupil Personnel Services.

Our conclusions in this regard are not altered by consideration of Petitioner's claims included in the materials she filed as "exceptions" to our Legal Committee's report in this matter.[1] Although we make no judgment concerning the validity of Petitioner's factual assertions pertaining to the Board's current assignment of responsibilities with respect to the positions of Director of Pupil Personnel Services and Assistant Superintendent,

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[1] We note that Petitioner's submission was untimely filed and largely pertained to matters outside the record.

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we emphasize that nothing in the education law precludes the Board from maintaining both positions and assigning to each such duties as could be performed under the certifications required in order to be qualified for employment in each position and to perform the attending duties.[2]

Finally, we find merit to Intervenor's arguments that he was entitled to notice and the opportunity to participate in the proceedings in this case. However, in light of our clarification that the terms of the State Board's decision of May 6 do not entitle Petitioner to employment as an Assistant Superintendent, we find it unnecessary to reopen the matter for plenary hearing.

In sum, for the reasons stated, we grant that portion of Intervenor's motion to supplement the record, but deny reopening of plenary hearing in this matter. By our decision, we are fulfilling the terms of the Appellate Division's remand, and, by clarification of our decision of May 6, 1987, we are also fulfilling the terms of the Chancery Division's order.

Attorney exceptions are noted.

April 6, 1988

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[2] We note that insofar as Petitioner's untimely submission raises factual questions that might support a cause of action under the education laws, such claims were obviously not made in the petition giving rise to the matters now before the State Board. The salient fact in these matters agreed to by all parties is that Petitioner was reinstated to the position title of Director of Pupil Personnel Services. Whether or not the Board has materially changed that position raises issues not within the scope of the original petition and which can not be considered in the absence of a full record. While the State Board notes with sympathy that this is the third time Petitioner has successfully petitioned to vindicate her rights, this does not provide justification for the State Board of Education to sua sponte ignore the due process rights and managerial prerogatives of the district Board.

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BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
ELIZABETH PELLE,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 2, 1987

For the Petitioner-Appellant, Jeffrey E. Snow, Esq.

For the Respondent-Respondent, Joseph N. Pinto, Esq.

The Board of Education of the Township of Florence has sought through these proceedings to recoup overpayment of temporary disability benefits and accumulated unused sick leave from Respondent, who was employed as a payroll clerk by the Board prior to her retirement on February 28, 1986. As found by the Administrative Law Judge (ALJ), Respondent received a check from the Board's compensation carrier in March 1985 following judgment entered in February 1985, awarding Respondent additional temporary disability benefits as a result of a work related injury suffered in 1983. In contrast to the compensation checks Respondent had received previously, she did not endorse the check, which was in the amount of $1,138.76, over to the Board. Upon her retirement, Respondent received a check for $1,786.04, reflecting Respondent's calculation of accumulated unused sick leave. As found by the ALJ, those calculations were not correct so that the check she received was for an amount greater than that due her.

In late February 1986, the Board Secretary asked Respondent to give over to the Board the check from the compensation carrier for $1,138.76. In March and April, the superintendent became convinced that, as a result of the compensation award, there was confusion as to the proper calculation of Respondent's accumulated sick leave.

On May 2, 1986, the superintendent reviewed those calculations with Respondent and, on May 13, 1986, wrote to her demanding reimbursement of $3,051.26. On May 19, Respondent's counsel replied, stating that it was necessary to obtain Respondent's file from her former attorney. On September 12, 1986, Respondent's counsel responded to the Board, stating that Respondent reasonably believed the compensation check was hers and that the

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Board was time-barred from collecting any overpayment from her. On September 24, 1986, the Board again wrote to Respondent's counsel, demanding repayment and stating that the Board would institute legal action of Respondent did not comply. Subsequently, on January 21, 1987, the Board filed its petition to the Commissioner.

In his Initial Decision, the ALJ concluded that although the petition was not filed within the 90 day limitation of N.J.A.C. 6:24-1.17, and although no statutory entitlement was involved, the 90 day rule should be relaxed because public funds were involved. He therefore recommended that Respondent be directed to repay $2,952, representing the amount she was overpaid in connection with her temporary disability and accumulated sick leave.

The Commissioner, observing that the sum of $2,952 derived from two separate claims by the Board, one for $1,138.76 paid by virtue of the supplemental disability award and one for $1,813.24 based on calculation of Respondent's accumulated sick leave on her retirement, found that withholding of $1,138.76 was statutorily prescribed by N.J.S.A. 18A:30-2.1, which provides that any amount of supplemental benefits paid or payable pursuant to that provision shall be reduced by the amount of any workmen's compensation award. The Commissioner concluded that the Board therefore had a statutory entitlement to the $1,138.76, and that this amount was recoverable. The Commissioner, however, rejected the ALJ's conclusion that relaxation of the 90 day rule was warranted, and found that the Board's claim for repayment of accumulated sick leave was time-barred since the petition was not filed within 90 days of either the letter from Respondent's counsel of September 12 or the Board's letter of September 24.

The State Board of Education affirms the determination of the Commissioner that the Board's claim to repayment for the amount paid to Respondent upon her retirement based on improper calculation of her accumulated sick leave is time-barred. As recognized by the Commissioner, the mere fact that public monies are involved does not warrant relaxation of the 90 day rule. As concluded by the Commissioner, the circumstances here provide no basis for relaxation so as to permit consideration of the claim. The Board's petition was not filed until more than four months had passed from notification by Respondent's counsel that she did not intend to repay the Board, and almost four months from its letter of September 24. That the Board may have hoped that Respondent would alter her position does not warrant relaxation in the face of clear notification from Respondent that she did not intend to repay the Board.

Likewise, we conclude that the Board's claim for repayment of the compensation award is also time-barred, and reverse the Commissioner's determination in that respect. The circumstances surrounding the Board's claim to that amount are identical to its claim for reimbursement for the overpayment of accumulated sick leave, with the exception of the fact that Respondent's original failure to endorse the check to the Board occurred in 1985 when the

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workmen's compensation award was made and the check was issued by the Board's compensation carrier. As concluded by the Commissioner, those circumstances do not warrant relaxation of the 90 day rule.

Nor may the Board be excused from compliance with the 90 day rule on the grounds that N.J.S.A. 18A:30-2.1 confers on it a statutory entitlement. In Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), the court held that the 90 day limitation of N.J.A.C. 6:24-1.2 is inapplicable where a petition has been filed to settle a controversy involving an absolute entitlement or right. Such a controversy is present where a petitioning teacher asserts an entitlement that is not functionally related to his experience as a teacher. North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ., 96 N.J. 587 (1984); Lavin, supra. See Gordon v. Passaic Township Board of Education, Docket #A-3294-84T7 (App. Div. May 27, 1986), certif. denied, September 16, 1986.

This case does not involve a claim by an employee for the benefit conferred by N.J.S.A. 18A:30-2.1. We therefore are not called upon to judge the nature of the benefit conferred by the statute on employees for purposes of establishing the applicability of the 90 day rule to such claims. We however conclude that the statute does not confer on boards of education an entitlement of such nature as to render the 90 day rule inapplicable.

We emphasize that the benefit granted by N.J.S.A. 18A:30-2.1 is clearly conferred on employees entitled to sick leave under the education laws, and not on boards of education. To the extent that the terms of the statute confer a benefit on boards of education, it is to mitigate a board's obligation to pay amounts to an employee who is entitled to the benefit conferred by N.J.S.A. 18A:30-2.1. Such incidental benefit is not of such nature as to render the 90 day rule inapplicable. Nor is the board's entitlement to reduce the amount paid or payable absolute, but rather is conditioned on award by the Division of Workmen's Compensation to the employee.

For the reasons stated, the decision of the Commissioner is affirmed in part and reversed in part. In holding that the Board's failure to conform to the requirements of the 90 day rule bars consideration of its claim in this forum, we emphasize that such holding in no way precludes the Board from seeking any legal redress that may be available to it in other forums.

January 6, 1988

Pending N.J. Superior Court

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AUGUSTUS C. AND COLETTE GERDING,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 24, 1987

For the Petitioner-Appellant, Augustus C. Gerding, pro se

For the Respondent-Respondent, DeMaio & DeMaio
(Vincent C. DeMaio, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. Like the Commissioner, we direct that the record in this matter be sealed in order to preserve the confidentiality of the sensitive material included.

April 6, 1988

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ROSS R. HUGHES,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 21, 1987

For the Petitioner-Appellant, Ruhlman, Butrym and Friedman (Mary Jane Cullen, Esq., of Counsel)

For the Respondent-Respondent, Samuel A. Christiano, Esq.

For the Intervenors-Respondents Cunningham and Garrett, Bucceri and Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Intervenors-Respondents Bearg, Farbman and D'Aris, Zazzali, Zazzali & Kroll (Kenneth I. Nowak, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 4, 1988

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HUNTERDON CENTRAL HIGH SCHOOL EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION, HUNTERDON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Remanded by the Commissioner of Education, February 28, 1986

Decided by the Commissioner of Education, December 26, 1986

Decision on motion by the Commissioner of Education, February 10, 1986

Decision on motion by the State Board of Education, March 4, 1987

Decision on motion by the State Board of Education, April 1, 1987

For the Petitioners-Respondents, Zazzali, Zazzali, and Kroll (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Appellant, James P. Granello, Esq.

For the Amicus Curiae, O. Lisa Dabreu, Assistant Counsel, New Jersey School Boards Association (Russell Weiss, Jr., General Counsel)

This is a consolidated case involving the questions of whether twenty-one petitioning custodians formerly employed by the Hunterdon Central Regional High School Board of Education were tenured pursuant to N.J.S.A. 18A:17-3, and, if they were, whether by subcontracting its custodial work and terminating their employment, the Board violated their tenure rights.

I

The case arose when, on June 30, 1985, the Board determined to terminate the employment of the individual Petitioners as a direct consequence of its decision to subcontract its custodial work to an independent contractor. On July 10, 1985, Petitioners, through their collective negotiations representative, the Hunterdon Central High School Education Association, filed a Petition of Appeal to the Commissioner, asserting that, pursuant to N.J.S.A. 18A:17-3, they were tenured and that their terminations were in

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abrogation of their tenure rights. The Board denied that Petitioners had ever acquired tenure and asserted that, even if they had, its action was fully consistent with its statutory obligation.

Following hearing on the issue of tenure, the Administrative Law Judge (ALJ), on motion by the Board, issued a summary decision in which, finding the language of the collective negotiations agreement controlling, he concluded that the individual Petitioners had been employed for successive one year terms and had not acquired tenure.

The Commissioner rejected the ALJ's finding that Petitioners had been employed for fixed terms. Finding that the language of the collective negotiations agreement did not establish a fixed term of employment and that neither the Board's salary notifications nor its resolutions had fixed such terms, the Commissioner concluded that Petitioners at the time of their terminations were tenured pursuant to N.J.S.A. 18A:17-3. The Commissioner therefore remanded the matter for resolution of whether the Board's action in abolishing the positions of its custodial employees conformed with the requirements of statute.[1]

The Board appealed the Commissioner's decision to the State Board, requesting that the matter be held in abeyance pending the outcome of the proceedings on remand.

On remand, the Administrative Law Judge found that the Board's ultimate determination to subcontract custodial services had resulted from dissatisfaction with the level of cleanliness and maintenance throughout the school. He further found that, based on the perception that the problem was related to supervision rather than the performance of individuals, the Board had explored various alternatives, rejecting an in-house alternative because of the allocation of administrative resources required and rejecting the option of subcontracting only management because that option would result in less control over individual performance. The ALJ found that the Board's decision to subcontract custodial services to Service Systems, the private entity ultimately awarded the contract, was based on performance record, bid specification and a study conducted for the Board. Based on his factual findings, the ALJ concluded that the Board had acted reasonably and in good faith at the time it made its determination and that its actions were not in contravention of statute.[2]

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[1] In remanding the matter the Commissioner inadvertantly cited as controlling N.J.S.A. 18A:28-9, which applies to teaching staff members. Hunterdon Central High School Education Association et al. v. Hunterdon Central Regional High School Board of Education, decided by the Commissioner, February 28, 1986, at 28. See Commissioner's decision on remand, at 33.

[2] Pursuant to the terms of the Commissioner's remand, see supra note 2, the ALJ's determination was made under N.J.S.A. 18A:28-9.

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The Commissioner rejected the ALJ's determination, finding that the principles applicable to reductions in force affecting tenured teachers were equally applicable to those affecting custodians. Applying those principles, the Commissioner found that Petitioners' positions had not in fact been abolished, and he directed their reinstatement to their former positions.

The Board appealed the Commissioner's decision, requesting consolidation with its appeal of the Commissioner's tenure determination. The Board also sought a stay of the Commissioner's directive for reinstatement.

In the absence of objection by the parties, we consolidated the appeals. On April 1, 1987, the State Board granted the district Board's motion for stay. We now must determine the merits of the Board's contentions that Petitioners were not tenured employees and that its actions were not in contravention of the education laws.

II

The threshhold issue in this case is whether the individual Petitioners were tenured as custodians pursuant to N.J.S.A. 18A:17-3. That statute provides that:

> every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office ... under tenure...

Pursuant to the statute, a janitor employed without a fixed term contract will gain tenure immediately upon employment, and, in the absence of a fixed term contract, the grant of tenure is presumptive. Wright v. Board of Educ. of City of East Orange, 99 N.J. 112 (1985). Conversely, employment for a fixed term is employment without tenure. Id.

Thus, in contrast to the teacher's tenure statute, N.J.S.A. 18A:28-5, N.J.S.A. 18A:17-3 grants a board the discretion to determine, by the terms of employment it establishes, whether to grant tenure to its custodians. Furthermore, since tenure determinations are discretionary, N.J.S.A. 18A:17-3 does not preempt collective negotiation on the subject of custodial tenure so that the subject is within the scope of public-sector negotiations. Wright v. Board of Educ. of City of West Orange, supra. Accordingly, the New Jersey Supreme Court held that a provision in a collective negotiations agreement affording custodians a right to tenure after three years of employment was controlling as to tenure status over individual employment contracts for fixed terms. Id.

The agreements in this case do not on their face address the tenure status of custodians. Rather, it is the Board's contention that the terms of the applicable collective negotiations agreements fixed Petitioners terms of employment and thereby precluded tenure status. Specifically, the Board asserts that by providing that "...full time employees shall be employed on an

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annual, 12 months basis,"[3] the words of the agreements fixed the terms of Petitioners' employment for definite one year periods.

Resolution of this question calls upon us to interpret the pertinent collective negotiations agreements. In interpreting the language at issue, it is our task to arrive at a reasonable construction, relating the phrase at issue to the context and the contractual scheme so as arrive at a meaning that comports with the probable intention. Kennedy v. Westinghouse Electric Corp., 16 N.J. 280 (1954). In this respect, we emphasize that the words at issue are not to be isolated and that the literal sense of the words may be qualified by the context. Id.

The language at issue was included in three separate agreements covering the period of July 1979 through June 1986. From 1979 through June 1981, the custodians were represented by the Hunterdon Central High School Secretaries and Custodians Association. R-1, in evidence. The agreement between the parties included general provisions applicable to both secretaries and custodians and included distinct provisions applicable to each in separate "contracts." Like the "Secretarial Contract," the "Custodial Contract" included an article headed "Work Year." R-1, in evidence, Article I. That article provided that:

> The work year of employees shall be as follows:
>
> A. Full time employees shall be employed on an annual, 12 month basis.

Subsequent provisions in the article provided for holidays, vacations and sick leave, and specified that employees would not be required to work both Christmas Eve and Easter Monday. Subsequent articles pertained to salary, work day, over-time, licensing and work loads.

In 1981, the Board recognized the Hunterdon Central High School Education Association as exclusive representative for the secretaries and custodians, as well as for teachers and other professionals. R-2, in evidence. In the agreement in effect from 1981 through June 1983, a single article headed "Work Year" included provisions applicable to both secretaries and custodians. R-2, in evidence, Article IX. As to secretaries, the article defined the work year and specified the contract period for annual contracts. In regards to custodians, the article provided that:

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[3] As subsequently discussed, the words annual and 12 month were set off by a comma in the agreement in effect from July 1979 through June 1981, but the comma was eliminated in later agreements.

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D. The work year of custodial employees shall be as follows:

1. Full time custodians and/or maintenance workers shall be employed on a 12 month annual basis.

2. All official state holidays are to be paid holidays.

3. Employees will be required to work either Christmas Eve or Easter Monday, not both.

The article also included a provision pertaining to work loads. R-2, in evidence, Article IX(E). The language of the provision in the 1983-86 agreement was identical to that in the 1981-83 agreement. R-3, in evidence.

We have carefully considered the language at issue in the context of the agreements. Based on that consideration, we find that the words "...shall be employed on a 12 month annual basis" can not reasonably be read to have fixed Petitioners' employment so as to preclude tenure status under N.J.S.A. 18A:17-3.

As set forth above, the language at issue in all three agreements was included in the article titled "work year." Furthermore, in each agreement, the particular provision pertaining to custodians specifies that it pertained to work year. Although the words annual and 12 month were separated by a comma in the agreement in effect from 1979-81, arguably supporting the reading urged by the Board, the comma was eliminated in the subsequent agreements. Moreover, from 1981, the article in which the provision was included was the article that included the provisions defining the work year of the secretarial employees. Read in context, the words at issue do no more than establish that the work year of custodial employees is 12 months each year.

Further, we can not ignore that the purpose of N.J.S.A. 18A:17-3 is to fulfill the janitors' need for help in acquiring job security. Wright v. Board of Educ. of City of West Orange, supra. In light of that purpose, we can not, in the absence of any indication that the parties negotiated the subject of custodial tenure, read the provision at issue in this case so as to preclude tenure under N.J.S.A. 18A:17-3. cf. Red Bk. Reg. Ed. Assn. v. Red Bk. High Sch. Bd. of Ed., 78 N.J. 122, 140 (1978).

However, while the terms of collective negotiations agreements do not preclude tenure, neither do any of the agreements include any provision awarding tenure. Nor did the Board adopt a policy providing for tenure status. In the absence of either collective agreement on the subject or Board policy, any representations that may have been made by mid-level management personnel did not confer tenure status on all custodial employees. Nor can the fact that the Board certified tenure charges in the case

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of a particular custodian have the effect of granting tenure to all custodians. Rather, pursuant to N.J.S.A. 18A:17-3, whether or not the individual Petitioners were tenured depends quite simply on whether the Board acted to appoint them for fixed terms.

In the absence of a collective agreement conferring tenure, individual employment contracts specifying fixed terms of employment would be dispositive of tenure status. cf. Wright, supra. However, although the terms of Petitioners' employment were not memorialized in individual contracts, the absence of such contracts does not in itself, establish that their employment was for an indefinite term. Lang v. Bd. of Ed. of Twp. of Holmdel, decided by the Commissioner, July 22, 1983. We therefore must examine the factual circumstances surrounding Petitioners' appointments by the Board.

The record in this case includes Board minutes for 1984 and 1985 pertaining to Petitioners' employment for 1984-85 and 1985-86. Exhibits P-1 through P-20, in evidence. The exhibits also include notice letters sent by the Board to Petitioners pertaining to the 1984-85 and 1985-86 school years. Id. The minutes for 1984-85 are titled "1984-85 Employees for Approval." Secretarial staff, operational assistants and custodial and maintenance employees are individually listed by category on the left. The next column lists salary, the next designates salary guide and the next column salary step. The right hand column specifies for secretarial employees whether each is a ten month or twelve month employee, and for custodial employees indicates additional stipends to be paid to individuals. The Board minutes relating to 1985-86 merely list under categories of custodial staff and maintenance staff individual custodial and maintenance employees, the salary and the step for each.

The notice letters for 1984-85 and 1985-86 are form letters reading simply:

> According to the salary guide your salary effective July 1, 1985 for the 1985-1986 school year is listed below.
>
> This salary has been determined at step _____ in the _____ lane [sic] of the salary guide.
>
> If you have any questions, please contact me at your earliest convenience.
>
> Salary _____

Although the record does not include minutes or notices for earlier years, the Board has indicated that its practices in earlier years were the same, and this is consistent with the notice letters to several individuals for 1982-83 that are included in the record. P-1, in evidence; P-3, in evidence; P-4, in evidence.

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Neither the Board minutes nor the notice letters support the conclusion that the Board acted to appoint its custodians for fixed terms. As found by the Commissioner, neither the minutes nor the notices affix any dates of employment. Further, the minutes are markedly similar in those in Gilliam v. Bd. of Ed. of Toms River Regional, 1974 S.L.D. 540, upon which the conclusion was reached that the petitioner in that case had been employed for an indefinite term, notwithstanding that he had been employed for definite terms in preceeding years. Moreover, in contrast to the circumstances in Lang, supra, the record here provides no indication that the Board had acted explicitly to make fixed term appointments in previous years.

In the absence of formal action by the Board to employ Petitioners for fixed terms, the terms of N.J.S.A. 18A:17-3 mandate a conclusion that Petitioners held their positions under tenure. The determination that Petitioners were tenured, however, does not resolve the question of whether the Board's actions in subcontracting for custodial services and terminating their employment violated Petitioners' tenure rights. We turn now to that question.

II

The question of whether termination of tenured custodians as a consequence of subcontracting for custodial service violates the rights afforded by N.J.S.A. 18A:17-3 and N.J.S.A. 18A:17-4 is one of first impression. In resolving this question, we recognize that the New Jersey Supreme Court has held that the decision of a public employer to subcontract is a non-negotiable matter of managerial prerogative. In re IFPTE Local 195 v. State, 88 N.J. 292 (1982). However, while the particular laws involved in the case before it did not blanketly prohibit subcontracting, the court recognized that the exercise of the prerogative to subcontract in a particular instance might violate statutory requirements. Id. at 406. It is our task to determine whether in subcontracting custodial services and terminating the employment of tenured custodians, the Board in this case violated the requirements of the education laws.

Like the Civil Service laws involved in IFPTE, the education laws do not blanketly prohibit subcontracting. Rather, those laws recognize the authority of a district board to contract for materials, supplies and services. See Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq. Although the exercise of such authority may be limited by other provisions of the education laws in the case of particular services, Petitioners have pointed to no provision of the education laws that would prohibit contracting for custodial services.

The question here is limited to whether the tenure protection afforded by N.J.S.A. 18A:17-3 and N.J.S.A. 18A:17-4 precluded the Board from exercising its discretion to subcontract in this instance. In resolving this question, we emphasize that N.J.S.A. 18A:17-3 and N.J.S.A. 18:17-4 are the statutes specifically

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applicable to custodial tenure and the rights attending such status. In that these statutes are significantly different from those applicable to certified professional staff, see N.J.S.A. 18A:28-5; N.J.S.A. 18A:28-6; N.J.S.A. 18A:28-9, we find that the Commissioner's reliance on cases involving reductions in force affecting tenured teaching staff members to resolve the instant case is misplaced.

The applicability of the cases primarily relied on by the Commissioner is further negated by distinctions in the factual circumstances in that, in contrast to this case, those cases involved the purported abolishment of a position held by one tenured teaching staff member with assignment of his duties to another teaching staff member employed by the district. See Sampietro v. Bd. of Ed. of Ridgefield Park, decided by the State Board, November 5, 1986; Viemeister v. Board of Education of Prospect Park, 5 N.J. Super. 213 (App. Div. 1979). The one case relied on that involved the contracting of services involved contracting that was subject to regulatory restriction. See Cochran v. Board of Education of Watchung Hills, Docket #A-2327-85T7 (App. Div. Dec. 22, 1988). There is no such limitation applicable in the case now before us.

The starting point for resolving whether the Board's actions were in violation of Petitioners' tenure rights is N.J.S.A. 18A:17-3, which prohibits dismissal of a tenured custodian except for an individual offense or

> except as the result of the reduction in the number of janitors in the district made in accordance with the provisions of this title.

Such reductions, in turn, are addressed by N.J.S.A. 18A:17-4, which provides that:

> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation...

In contrast to reductions affecting tenured teaching staff members, N.J.S.A. 18A:28-9, reduction in the number of custodians employed is permitted by the statute unless taken for one of the prohibited reasons.[4] Thus, the terms of N.J.S.A. 18A:17-4 do not prohibit the dismissal of tenured custodians resulting from a decision to subcontract for custodial services. In the absence of statutory or regulatory prohibition of subcontracting for such services, we conclude that a reduction resulting from subcontracting does not in itself violate custodial tenure rights, notwithstanding

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[4] Petitioners do not assert that the Board's actions were taken for any of the reasons prohibited by the statute.

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that in every instance where subcontracting occurs the services formerly provided by district employees will continue to be provided in the district. In that regard, we emphasize that although a district board does not have absolute discretion to subcontract for services in every instance and while there are sound educational reasons for restricting a board's freedom to subcontract with respect to the core of the educational mission, such rationale does not apply to all personnel.

We, however, are mindful that, in holding that the decision to subcontract is a managerial prerogative, the New Jersey Supreme Court emphasized that

> [t]he State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees.

In re IFPTE Local 195 v. State, 88 N.J. 393, 411 (1982).
In light of the tenure protection afforded custodians by N.J.S.A. 18A:17-3, we conclude that where subcontracting results in termination of tenured custodians, the propriety of a board's actions must be carefully examined so as to assure that the decision to subcontract was made in good faith and not for the sole purpose of laying off tenured employees.

After carefully examining the record in this case, we find that it fails to support the conclusion that the Board's decision to subcontract was anything other than a good faith determination that contracting for custodial services would provide more efficient and economical custodial services for the benefit of the district. As found by the Administrative Law Judge, the Board's ultimate decision to subcontract custodial services was rooted in long standing dissatisfaction with the level of cleanliness and maintenance throughout the school. As a consequence, the Superintendent initiated exploration of the alternative of contracting for custodial services. Contact was established with potential contractors, and two contractors provided needs assessments, both of which indicated that deficiency in custodial maintenance was related to lack of proper supervision within the facility on a daily basis and lack of an ongoing training program. J-3, in evidence.

At its public meeting on March 4, 1985, presentations of the contractors' surveys and their proposals were made to the Board. In response to a question concerning how it would recruit new employees, Service Systems, the entity ultimately awarded the contract, responded that it would prefer to employ individuals from the current operation.

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Following the public meeting, executive session was held, at which the Board's consensus was to retain in-house staff, but perhaps with outside supervision. Based on that, Service Systems developed two proposals, one for a managerial change only and another involving direct employment of all custodial staff.

At its executive session, the Board also requested that the Superintendent formulate an in-house plan and, at the same time, the Board arrived at a general consensus that bid specifications should also be drafted and Board action taken to receive bids.

On April 22, 1985, at a special public meeting, the Board considered the options available to it. It discussed the bids of the two contractors for total contracting and for contracting for management services only. It also considered the Superintendent's in-house proposal.

The Board rejected the in-house proposal because it concluded that that alternative would mandate excessive administrative time be spent on custodial operations rather than on curriculum, R-3, in evidence, and because, in light of its past failures to recruit capable custodial managers, it was uncertain it could fill the managerial title. It rejected the alternative of contracting only for management services on the basis that such management structure results in significantly less control over workers' performance. Based on its consideration, the Board voted to abolish all custodial positions and to accept Service Systems bid, which it projected would result in a savings of $118,491.

Service Systems assumed responsibility on July 1, 1985. The Board's former custodial employees commenced employment with Service Systems, receiving a salary equal to that which they would have received from the Board, and additionally received a salary increase 90 days after commencing employment. They also organized into a collective negotiations unit and negotiated a new agreement, which provided enhanced benefits over those initially offered by Service Systems.

At the same time, the Board agreed to pay its former employees a sum of money based on years of service, and agreed to retain in its employ until later dates two individuals so as to permit their pension rights to vest.

There has been no study concerning the current level of custodial operations. The testimony does indicate that there is no significant difference in the facilities, and that the agreed upon levels of training and instruction may not have been provided. However, the Superintendent assessed that the administration has benefitted from the change in that it is able to devote greater energy to curricular activities.

We see nothing in the factual circumstances to indicate that the Board acted for the purpose of laying off Petitioners so as to circumvent their rights. The Board's decision to subcontract was based on its desire to solve a long standing problem in the level of

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maintenance, which it perceived to be related to supervision rather than individual performance. Consistent with its perception, it explored various alternatives, all of which involved changing the supervisory structure. It considered three specific alternatives. Although the in-house proposal offered the possibility of solving the problem while retaining Petitioners in the Board's employ, the Board was not obligated to select that alternative, and we find that its rejection of that proposal was reasonable in light of its concerns. cf. In re IFPTE Local 195 v. State, supra, at 407-10.[5] The fact that the Board considered several options supports, as do its agreements pertaining to the effects of the decision on Petitioners, that the decision to subcontract in this case was made in good faith and not for the purpose of terminating Petitioners. The fact that the particular contractor providing the services may not be performing to the standards anticipated by the Board does not invalidate the legitimacy of its decision. Nor does the fact that anticipated savings may not have been realized invalidate the decision, especially in light of the fact that the decision was not primarily based on financial considerations.

In sum, Petitioners have not shown that the Board's decision to subcontract was made in other than good faith for the legitimate purpose of improving the level of facilities cleanliness and maintenance in the district. Under the circumstances presented and in the absence of prohibition by the education laws of subcontracting for custodial services, we conclude that the Board's decision to subcontract in this case was a legitimate exercise of its managerial prerogative. Consequently, termination of Petitioners' employment by the Board was not in contravention of their rights under the education laws notwithstanding that they were tenured pursuant to N.J.S.A. 18A:17-3.[6]

III

In sum, we conclude that the collective negotiations agreements in this case did not establish fixed terms of employment for custodial employees so as to preclude tenure. We find that, in the absence of formal Board action appointing Petitioners for definite terms, N.J.S.A. 18A:17-3 mandates a conclusion that they

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[5] We note that this case is not one in which the decision to subcontract was based solely or primarily on fiscal considerations. We further note that the basis for rejecting both the in-house proposal and the option of contracting only for management services were concerns over aspects of operations over which Petitioners had no control.

[6] We however note that, based on their tenure status, Petitioners must be placed upon a preferred eligibility list in order of years of service for reemployment by the Board in the event it subsequently determines to reestablish its custodial positions. N.J.S.A. 18A:17-4.

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were tenured. In this regard, we emphasize that the terms of N.J.S.A. 18A:17-3 are such that the failure of a district board to exercise the discretion conferred on it by acting explicity as to the terms of custodial appointments may result in tenure status where the board did not intend to grant such status.

We further conclude that although the protection afforded by N.J.S.A. 18A:17-3 requires that a board's decision to subcontract for custodial services be made in good faith and not for the purpose of laying off tenured employees, dismissal of tenured custodians resulting from a decision to subcontract does not in itself contravene the requirements of the education laws. We find that in this instance, the Board's decision to subcontract, which resulted in the termination of Petitioners employment by the Board, was a legitimate exercise of the Board's prerogative so that the Board's actions were not in contravention of Petitioners' tenure rights as established by N.J.S.A. 18A:17-3 and N.J.S.A. 18A:17-4.

For the reasons stated, the State Board of Education affirms the Commissioner's determination that Petitioners were tenured custodial employees, but reverses his decision that the Board's actions violated the rights afforded Petitioners by that status.

Attorney exceptions are noted.
May 4, 1988

Pending N.J. Superior Court

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BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 30, 1987

For the Petitioner-Respondent, Miller and Kinney
(William R. Miller, Esq., of Counsel)

For the Respondent-Appellant, Green and Dzwilewski
(Jacob Green, Esq., of Counsel)

This is an appeal from a decision of the Commissioner, which held that the Council of the Township of Irvington had failed to provide reasons for its line item reductions of the Board's current expense budget and capital outlay pursuant to N.J.S.A. 18A:22-37 so as to warrant restoration of the amounts reduced. The Commissioner rejected the Council's contentions that, in relying on its budget consultant's work sheets and cover letter and in providing the worksheets to the Board, it had fulfilled the requirements of Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966). Rather, the Commissioner found that the Council had failed to fulfill those requirements in that not only was there no indication that the Council had provided the Board with the cover letter prior to answering the Board's petition, but that even if the letter had been provided, the Council had not articulated any linkage between the proposed reductions and valid educational concerns. The Commissioner further concluded the preliminary budget discussions between the Board and Council could not be used to demonstrate that the Council had complied with the requirements of East Brunswick when it adopted its resolution determining the amounts to be raised in the local tax levy. Finally, although recognizing that a governing body may consider a district board's anticipated income, unappropriated free balance and investment income when acting pursuant to N.J.S.A. 18A:22-37, the Commissioner found that the Council in this case had failed to meet its obligation to specifically delineate the reasons why it believed any of those revenues are in excess of the Board's needs. The Commissioner therefore granted the Board's motion for summary judgment and directed that the additional amounts of $6,049,000 in current expense and $341,700 in capital outlay be certified to the Board of Taxation.

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Initially, we emphasize that the import of the requirement that a governing body provide the rationale for its reductions when it acts pursuant to N.J.S.A. 18A:22-37 is both to facilitate the review process and to assure that the governing body has fulfilled its primary obligation to act concientiously at every step to effect savings that do not impair the educational process. Board of Education of East Brunswick Township v. Township Council of East Brunswick, supra. See Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, decided by the State Board, August 5, 1987, appeal pending, Appellate Division, Docket #A-3-87T7.

In this case, not only did the Council fail to provide the Board with the cover letter that ostensibly set forth the rationale for its reductions, but, as found by both the Administrative Law Judge and the Commissioner, neither the worksheets nor the cover letter articulate any linkage between the reductions and the educational process. Furthermore, although we recognize that a governing body may consider investment income and unappropriated free balance, i.e., "surplus," in reaching its determination as to the amount required to be raised by taxation, we emphasize that its action in that regard may not be either procedurally or substantively arbitrary. Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 570 (App. Div. 1983). Based on our review of the worksheets and cover letter, we find that references to surplus included do no more than reflect the Council's view that the Board did not need that amount of "surplus". The Council failed in this case articulate any rationale indicating a relationship between the reductions it made in specific line items and any amount of "surplus". Nor did it provide reasons in support of a conclusion that these revenue items are in excess of the Board's needs. These failures render the Council's action with respect to "surplus" arbitrary.

We find no merit to the Council's claims that the Board "stonewalled" the Council so as to prevent it from coherently articulating the required rationale. Council's brief, at 15. There is no indication that this was the case and, as concluded by the ALJ, the Board did in fact provide the Council with adequate information to analyze so as to articulate its specific reasons when it acted.

We also reject the Council's contention that it was not required to provide reasons because its reasons were both obvious and known to the Board from the context of meetings and public statements made by Council members. Such comments do not constitute a coherently articulated rationale supporting the reduction of specific line items of the budget so as to enable the Board to respond and to provide the assurance that when the Council acted it did so conscientiously to effect those savings that would not impair the educational process. Board of Education of East Brunswick Township v. Township Council of East Brunswick, supra; Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, supra.

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In sum, we, like the Commissioner, conclude that the Council in this case failed to fulfill its obligation to provide the reasons for its reductions when it acted, and, as did the Commissioner, we further conclude that the Council's failure was more than the failure to include the cover letter to the attachments accompanying its resolution. As found by the ALJ and the Commissioner, the Council failed to articulate any linkage between its line item reductions and the educational process so as to indicate that it considered the impact of the reductions on educational process, and we fully concur with the Commissioner that the Council's failure to provide such reasons when it acted rendered the reductions arbitrary so as to warrant restoration of the amounts. Therefore, for the reasons set forth above, as well as those expressed by the Commissioner, we affirm the Commissioner's decision in this case.

April 6, 1988

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BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 30, 1987

Decided by the State Board of Education, April 6, 1988

For the Petitioner-Respondent, Miller and Kinney
(William R. Miller, Esq., of Counsel)

For the Respondent-Appellant, Green and Dzwilewski
(Jacob Green, Esq., of Counsel)

The Council of the Township of Irvington is seeking a stay of the State Board of Education's decision of April 6, 1988, which is currently on appeal to the Appellate Division. In our decision, we affirmed the Commissioner's decision, holding that the Council's failure to articulate a rationale that indicated that it gave any consideration to the impact on the education process of its reduction of the district Board's proposed current expense budget and capital outlay rendered the Council's action arbitrary so as to warrant, as directed by the Commissioner, that the amounts in question be certified to the County Board of Taxation.

The underlying facts were not complex. Following voter defeat of the Board's proposed budget, the Council, acting pursuant to N.J.S.A. 18A:22-37, reduced line items in the Board's current expense budget by $3,049,000. Those reductions consisted largely of across the board decreases in the percentage of increases proposed by the Board in the categories of administration and instruction, attendance and health, transportation, and operations, and were based on reductions achieved in all other cost centers and historical savings in other years' budgets.

At the same time, the Council reduced another $3,000,000 from the amount to be certified for tax purposes for current expenses. This "reduction" however was not achieved by reduction in any line items in the proposed current expense budget. Rather, the Council merely reduced by $3,000,000 the amount to be certified on the basis that the Board could fund this amount in current expenses by applying unappropriated free balance ("surplus") to its proposed

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current expense budget. Likewise, the Council determined not to certify $341,700 in capital outlay, a proposed amount pertaining to repair and replacement items, on the basis that there was then unappropriated free balance in capital outlay.

As stated, the Commissioner directed that the total amounts of $6,049,000 in current expenses and $341,700 in capital outlay be certified for tax purposes. Although the Council appealed the Commissioner's decision to the State Board, it did not seek a stay of the decision. However, neither did it comply with the decision as required by N.J.S.A. 18A:6-25.

Following our affirmance of the Commissioner's decision, the Board, on May 3, 1988, filed an order to show cause in Superior Court, Law Division, seeking to compel payment. On May 19, 1988, the Council filed a notice of appeal from our decision with the Appellate Division.

By notice dated May 26, the Council sought from the State Board a stay of our decision, filing its brief in support of the motion on June 24. In the interim, the Board's action to compel payment was dismissed by order of June 7.

In that the State Board of Education would be unable to consider the Council's motion for stay until its public meeting on August 3, see N.J.S.A. 18A:6-29; N.J.A.C. 6:2-1, on July 12, the Appellate Division stayed the State Board's decision until August 3.

In support of its motion for stay, the Council argues that a stay should be granted because otherwise the monies would be spent and the taxpayers would suffer the effects of a large tax increase. It contends that the Board's need for the monies is moot in that it is too late to expend the monies for the purposes they were sought, and that the Board's need for the monies is largely unsubstantiated. The Council further argues that the Board has suffered no harm from the reductions and, in any event, if the programs were needed it could have funded them from surplus. It points to the fact that no funds were borrowed to show that none were needed. The Council also contends that if it was required to comply with the State Board's decision, it would have to borrow, which it asserts would cost $400,000 in interest plus fees to bond counsel. Finally, the Council maintains that it will prevail on the merits of its appeal to the Appellate Division in view of the Court's decision in Board of Educ. v. Deptford Tp., 225 N.J. Super. 76 (App. Div. 1988). For the reasons that follow, we would deny the Council's motion.

Initially, we emphasize that in these proceedings the Council bears the burden of establishing that: 1) there is a clear likelihood that it will prevail on the merits of its appeal to the Appellate Division, 2) irreparable injury will result if the stay is not granted, 3) upon balancing the hardships, the harm to the Council from denial of a stay outweighs the damage to the Board if the relief afforded by our decision is granted and 4) that the public interest requires that our decision be stayed. Crowe v.

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De Gioia, 90 N.J. 126 (1982); Zanin v. Iacono, 198 N.J. Super. 490, 498-99 (Law Div. 1984). In this respect, it is our task to engage in a delicate balancing of the interests of the parties and the public as they may be affected by the granting or denying of a stay in this case. cf. Yakus v. United States, 321 U.S. 414, 440 (1944).

We reject the Council's claim that in view of the Appellate Division's decision in Deptford, the Council is likely to prevail on the merits of its appeal. In Deptford, the court considered an appeal from a summary decision reinstating amounts reduced by the municipal body from the board's current expense budget where, although the municipal body failed to provide the reasons for its line item reductions when it acted, it did submit its reasons when it filed its answer to the district board's amended petition challenging the reductions. The central issue before the court in Deptford was whether the governing body had filed a timely statement of reasons justifying its reductions so as to entitle it to a hearing on the merits. 225 N.J. Super. at 81. In holding that our affirmance of the summary decision in that case was improper, the court found that neither the statute nor the New Jersey Supreme Court's decision in Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966), established when the reasons supporting the governing body's action must be submitted. 225 N.J. Super. at 83. Concluding that the reasoning of East Brunswick with respect to a detailed statement of reasons did not have the same significance at the local level as before the Commissioner, the court discerned no prejudice to the Commissioner, State Board, the local board or the students if, as was the circumstance in the case before it, after requesting a meeting with the local board, the governing body submitted its reasons at the time it filed its answer to the petition. Id. at 84. In contrast, the court found that there may be prejudice to the taxpayers if the matter is not heard on the merits. Accordingly, the court reversed our decision and remanded the matter for consideration on the merits.

In contrast to Deptford, the question of when a governing body must provide the reasons for its reductions is not central to this case. Although the cover letter articulating the reasons underlying the Council's actions was not transmitted to the Board when the Council acted, and although we did consider this fact, the Council's failure in this regard was not pivital to our decision. Rather, our decision focused on whether the Council's action was substantively arbitrary, and our conclusions were based, as were the ALJ's and the Commissioner's, on consideration of the rationale articulated in the cover letter and reflected in the accompanying documentation, as well as the affidavits and arguments submitted by the parties. It was our view, as embodied in our decision, that the Council's failure to articulate a rationale demonstrating any consideration of the impact on the education process of its reductions of the current expense items it identified rendered those reductions arbitrary. Likewise, although we acknowledged that a governing body may consider revenue items such as "surplus" in making reductions to a Board's current expense budget, we concluded that by its failure to indicate a relationship between specific line items in current expenses and any amount of "surplus" and its

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failure to provide any reasons in support of a conclusion that these revenue amounts were in excess of the Board's needs, the Council's action with respect to "surplus" was arbitrary.

Again, these were not the issues presented by Deptford. Consequently, they were neither addressed nor decided in that case. We therefore reject the Council's claims that by virtue of the Deptford decision, it has a settled legal right to the relief it is seeking in its substantive appeal to the Appellate Division and that it has shown a probability that it will succeed on the merits of that appeal.

We now must balance the injury resulting to the Council if we were to deny a stay against the harm to the Board if it now is denied the relief afforded by our decision. In this respect, we recognize that although the parties to this case are the governing body and the district board, the interests of the taxpayers and the students as they may be affected by the grant or denial of a stay are critical to our determination.

We acknowledge that were the Board to expend the moneys at issue, repayment to the taxpayers would be problematic. However, this is precisely the scenario in every case where the Commissioner directs restoration of amounts to a current expense budget and the governing body appeals. Equally present in each case is the permanent educational loss to the district's students that occurs where the amounts are not restored to the board's current expense budget during the pendency of the appeal.

While the potential for loss of educational benefits might be diminimus in many districts, this is a case involving a district that has consistently failed to meet the standards established by the monitoring process under which the fulfillment of its constitutional responsibility to provide a thorough and efficient education is measured. N.J.S.A. 18A:7A-1 et seq.; N.J.A.C. 6:8-1 et seq. Specifically, we note that, although the performance of Irvington's ninth-grade students on the High School Proficiency Test (HSPT) has greatly improved from 1986, when more than 60% of its students failed to pass in each of the three sections of the test,[1] thereby jeopardizing the District's certification, the District has not yet met the standard of 75% passing in each section that is required to achieve certification. We further note that because the District's well-documented, long-standing and severe facilities deficiencies have not yet been corrected, its students continue to attend school in facilities that are both substandard and overcrowded. In this context, any fiscal impact on the taxpayers that is susceptible to adjustment in a subsequent year does not outweigh the continuing educational loss to the students.

Nor has the Council established that the taxpayers would in fact suffer a negative fiscal impact were we to deny a stay. To the

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[1] We note that the scores of the District's students in 1986 for the math and reading sections were the lowest in the state.

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contrary, in addition to exacerbating the educational loss suffered by the the students thus far as a result of the deferral of programs and hiring of additional staff, a stay would have a negative fiscal impact on both the Board and the taxpayers.

In this respect, we emphasize that the consequences of eliminating amounts from a district board's current expense budget are far greater than merely to deprive the district of the ability to spend those amounts in a given year. Because state equalization aid is calculated and disbursed on the basis of the district's net current expense budget for the prior year, see N.J.S.A. 18A:7A-3; N.J.S.A. 18A:7A-18, any amount not included in the current expense budget for a given year has a pyramiding effect with each subsequent year. Thus, the financial loss is compounded with each succeeding year, in turn compounding the educational loss.

In this case, pursuant to the Commissioner's decision directing restoration of $6,049,000 to the tax certification for current expense purposes for 1987-88, that amount was included in the net current expense budget for purposes of calculating state equalization aid for 1988-89. Consequently, the District was awarded aid on the disputed amount, thereby reducing the amount of local contribution required to fund the Board's 1988-89 current expense budget.[2] This, in turn, will have a positive impact on Irvington's tax rate for the 1988 tax year.[3] The effect of granting a stay would be to exclude this amount from the Board's 1988-89 current expense budget for purposes of state aid for 1989-90. This would result in a lesser amount of state aid, which in turn would increase the amount of local contribution required to meet current expenses in the 1989 tax year, thereby having a negative impact on the tax rate in that year. Likewise, although the amounts involved are much smaller, the impact would be similar with respect to capital outlay since state aid for budgeted capital outlay is awarded on the basis of the capital budget outlay for the preceding year. N.J.S.A. 18A:7A-19.

Nor can we ignore the impact of a stay on the District's long standing and severe facilities problem, the history of which has been characterized by voter refusals to approve bond issues aimed at remedying the situation. We note that, as indicated in the Initial Decision in this matter, the Board has been attempting to address the problem through the alternative of lease-purchase and

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[2] We note that the District's support ratio for state equalization aid for 1988-89 is 75.51%, which means that inclusion of the disputed amount in the Board's 1987-88 net current expense budget represents approximately $4.5 million in state aid.

[3] We note that the 1988 tax rate as established by the Essex County Board of Taxation for school purposes is $2.73 per $100 of assessed value as compared to $3.16 per $100 in 1987.

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had accumulated surplus for this purpose. We take cognizance of the fact that, regardless of how the project is ultimately funded, Irvington clearly will be required to expend additional monies upon completion of the of the facility for additional personnel to staff the building and for the requisite equipment and supplies. The effects of the tax increase that then will be required are potentially catastrophic. We find that under these circumstances, staying restoration of the amounts at issue in this case so as to further defer the building plan would only exacerbate the situation, having a negative educational impact by perpetuating the conditions under which the students attend school while, ultimately, providing no benefit to the taxpayers.

We also reject the Council's contention that the fact that the Board did not borrow money to fund current expenses for 1987-88 shows that it did not need the money. While we recognize that the Board may have had the authority to borrow, see N.J.S.A. 18A:22-44.1, on the record before us, we can neither infer that this was in fact an option nor draw any conclusions as to why the Board did not borrow to fund its current expenses. Further, regardless of whether such funds are borrowed by a district board or by a municipal body, the revenue source for repayment is the same: local tax revenues.

In sum, we conclude that the Council has failed to show that it will prevail on the merits of its appeal to the Appellate Division. Nor has it demonstrated that it or the taxpayers would suffer irreparable harm if we were to deny a stay, or that the fiscal impact on it would outweigh the educational loss and negative fiscal impact on the Board that would occur if we granted a stay. Futhermore, given the impact of a stay on state aid, we are not convinced that a stay would provide any benefit to the taxpayers and, in light of the facilities deficiencies in this district, may contribute to increasing the burden that the District's taxpayers will ultimately bear.

Finally, we emphasize that it is society that benefits when our children are provided an education such as to prepare them to function politically, economically and socially in a democratic society. See N.J.S.A. 18A:7A-1 et seq. While we are not unmindful that the taxpayers in a particular district must bear the cost of an increase to local contribution to education, it is equally true that it is those same taxpayers who bear the far greater long-term costs of a failure to provide a thorough and efficient education. In that the District in this case is one that is not providing an education meeting the required standards, we do not believe that it is in the public interest to exacerbate the educational loss to the District's students by granting a stay.

Attorney exceptions are noted.
September 7, 1988

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BOARD OF EDUCATION OF THE BOROUGH OF KINNELON,	
PETITIONER-RESPONDENT,	
V.	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,	DECISION
RESPONDENT-APPELLANT.	

Decided by the Commissioner of Education, May 22, 1986

Remanded by the State Board of Education, October 3, 1986

Decision on remand by the Commissioner of Education, November 25, 1986

For the Petitioner-Respondent, Curtin, Hubner & McKeon (Thomas R. Curtin, Esq., of Counsel)

For the Respondent-Appellant, Greenwood & Sayovitz (Robert H. Greenwood, Esq., of Counsel)

This case was initiated when, in September 1985, the Board of Education of the Borough of Kinnelon filed a petition for a declaratory judgment, seeking additional monies for tuition payments for 1983-84 based on actual costs as established in July 1985 by formal audit by the Department of Education's Division of Finance. The matter arose when, following the expiration of a five year sending-receiving agreement between the Board of Education of the Borough of Kinnelon and the Board of Education of the Borough of Riverdale in 1980, the parties failed to arrive at a new agreement. Pursuant to the terms of the five year agreement, which was in effect from 1976-77 through 1980-81, that agreement, including the terms pertaining to tuition, was extended for one year. Accordingly, Riverdale's tuition payments to Kinnelon for 1981-82 were determined by the formula set forth in the five year agreement. Likewise, although the provision for extension of the agreement was no longer in effect, tuition for 1982-83 was determined under that formula.

As the 1983-84 school year approached, the parties had not arrived at a new agreement concerning their sending-receiving relationship. Rather, during this period, Riverdale was seeking through the litigation process to withdraw its 7th and 8th grade students from the relationship. See Board of Education of the

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Borough of Kinnelon v. Board of Education of the Borough of Riverdale, Docket #A-3857-83T2 (App. Div. February 8, 1985).

Although the record indicates that prior to the 1983-84 school year, there was some communication between the parties, the extent and substance of such communication is not entirely clear. Tr. 2/26/86 at 52-55. The record does show that prior to the commencement of the school year, Kinnelon's Business Administrator provided Riverdale with a tuition amount calculated under the formula previously applied, but that he considered the amount to be tentative. Id. at 53-54.

There is no indication of further formal communication between the parties until Kinnelon advised Riverdale by letter of November 15, 1983, that because the final terms of the sending-receiving agreement had resulted in a large loss of tuition revenue, it was determining tuition rates for 1983-84 on the basis of the formula approved by the State Department of Education. Following receipt of that letter, a meeting was held between the parties on December 20, 1983, at which time Riverdale's representatives indicated that they would make the adjustment in the method of payment requested by Kinnelon subject to review and approval of Riverdale's counsel. That approval was not given, and on April 19, 1984, Riverdale's Superintendent notified Kinnelon that Riverdale did not consider itself liable for any additional tuition payments for 1983-84. As set forth above, on July 3, 1985, Kinnelon was advised of the results of the formal audit by the Division of Finance. That audit, which had been undertaken as a result of inquiry by Kinnelon to the State Department of Education in February 1984, established the amount of tuition Riverdale would be obligated to pay if tuition for 1983-84 was based on actual cost. Kinnelon then petitioned the Commissioner seeking payment of that amount.

In his initial decision, the Administrative Law Judge recommended dismissing the petition because Kinnelon had not filed it within ninety days of when it was advised by Riverdale that Riverdale would not pay any additional tuition for 1983-84. The Commissioner rejected this recommendation, concluding instead that the petition was timely filed within ninety days of when Kinnelon learned of the amount actually due and payable as established by the audit. Without any discussion, the Commissioner directed payment of the difference between the amount paid by Riverdale for 1983-84 and the actual costs as established by the audit.

On October 3, 1986, the State Board of Education remanded the matter to the Commissioner in order that he determine whether the tuition rates provided Riverdale for 1983-84 were tentative rates within the meaning of N.J.A.C. 6:20-3.1(d) (1983) (amended 1984) and thereby provide a basis for his directive. On remand, the parties agreed that the record was sufficient to resolve the matter without further hearing. The Commissioner then determined that the rates established by Kinnelon prior to the 1983-84 school year were tentative, relying on his statement to that effect in his summary of

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the sequence of events included in his first decision. The Commissioner further found that the rates established by the Division of Finance in its formal audit were, in accord with N.J.A.C. 6:20-3.1(d), final amounts due and payable by Riverdale to Kinnelon.

The Board of Education of the Borough of Riverdale again appealed, arguing that the rates communicated to it prior to the 1983-84 school year were not tentative and that under N.J.A.C. 6:20-3.1(d) as in effect at the time the dispute arose, it could not be held to a higher amount. It further argues that even if the rates were tentative, Kinnelon is not entitled to any increase based on a change in the method of calculation because notice of change was given during the same year for which the change was sought. Finally, it argues that the Commissioner's decision can not be supported because it does not include any reasoned analysis of the disputed factual or legal issues. Riverdale, however, urges that the State Board make the final decision in the matter rather than remanding it again since the record contains all the evidence required to resolve the issues and considerable time and money have already been expended in the matter.

We concur with Riverdale that in reaching his decision, the Commissioner improperly failed to articulate any reasoned analysis to support his conclusions. e.g., Board of Education of East Windsor Regional School District v. State Board of Education, 172 N.J. Super. 547, 552 (App. Div. 1980). We further agree, however, that the record here is sufficient to permit resolution of the matter and that further remand would unnecessarily burden the parties. Therefore, based on the record, will now render, on appeal, the final agency decision in this matter.

This case calls upon us to resolve whether or not the rates communicated to Riverdale prior to the 1983-84 school year were tentative rates within the meaning of N.J.A.C. 6:20-3.1(d) as in effect when the dispute arose. That regulation was enacted pursuant to N.J.S.A. 18A:38-20, which provides:

> Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board,...

N.J.A.C. 6:20-3.1(d) as in effect during the relevant period provided in pertinent part that:

> A tentative tuition rate may be set by agreement between the receiving district and the sending

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> district, and such tentative rates shall be based upon the estimated cost per pupil for the ensuing school year, as to be reflected in the proposed budget of the receiving district.
>
> 1. If the sending district and the receiving district reach an agreement before January 1, they shall so notify the Commissioner.
>
> 2. If the sending district and the receiving district cannot reach agreement on the estimated cost per pupil by January 1, then the tentative tuition rate shall be based upon the actual cost per pupil for the completed school year immediately preceding....
>
> 4. If the commissioner later determines that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district may charge the sending district all or part of the amount by which the actual cost per pupil exceeded the tentative rate, to be paid not later than during the second school year following the school year for which the tentative rate was paid...

Thus, although subsequently the regulation was substantially amended so as to mandate the setting of tentative tuition charges, see N.J.A.C. 6:20-3.1(d) (as amended 1984), the regulation applicable here was permissive. e.g. Board of Education of the Township of North Bergen v. Board of Education of the Township of Guttenberg, 1973 S.L.D. 18, aff'd by the State Board, 1974 S.L.D. 1415, remanded on other grounds, 1975 S.L.D. 1111; Board of Education of the City of Cape May v. Board of Education of the Township of Lower et al., 1963 S.L.D. 48. In the event that a district opted to set a tentative rate, thereby making such rate subject to adjustment later based on actual cost, it was required to follow the precise procedures set forth in the regulation, and a failure to attempt to do so deprived it of the right to claim the benefit of the rule. Board of Education of the City of Cape May, supra. In this case, regardless of the perception of Kinnelon's School Business Administrator that the rate he provided Riverdale prior to the 1983-84 school year was tentative, the procedures specified by N.J.A.C. 6:20-3.1(d) were not followed. The record indicates that Kinnelon first communicated with Riverdale concerning tuition for 1983-84 in the summer of 1983, well beyond the date specified in the regulation, and notification to the Commissioner was never made. Further, the communication in no way indicated that Kinnelon was seeking to establish a tentative rate. Under these circumstances, which are absent of any indication that Kinnelon attempted to follow the procedures specified in the regulation, we must conclude that in providing the tuition rate to Riverdale prior

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to commencement of the 1983-84 school year, Kinnelon did not establish a tentative rate within the meaning of N.J.A.C. 6:30-3.1(d) as then in effect. Board of Education of the City of Cape May, supra.

Further, in the absence of any overt conduct indicating that it was attempting to reach agreement as to a tentative rate when it communicated the rate to Riverdale for 1983-84, we conclude that Kinnelon can not now claim the benefit of the regulation pursuant to N.J.A.C. 6:20-3.1(d)(2). The language of that provision is clear that a tentative rate is established by operation of the regulation where there has been an attempt to reach agreement as to a tentative rate, and that attempt has failed. This is not such a case. Rather, here, Kinnelon communicated a rate to Riverdale without any indication that it was seeking to establish a tentative rate, and there is no indication of any disagreement by Riverdale with that rate.

Under N.J.A.C. 6:20-3.1(d) as then in effect, where a district board failed to follow the procedures specified in the regulation, but had communicated a rate to the sending district without any overt action indicating an intent to establish a tentative rate, that rate was not subject to later adjustment even in the absence of express agreement controlling tuition. e.g., Board of Education of the City of Cape May, supra. Although the districts in this case had no express agreement in effect for the 1983-84 school year, notice of a rate based on the same formula as used by the parties in prior years, in the absence of any overt conduct indicating Kinnelon's intent to utilize a right to fix the rate as tentative, justified Riverdale in regarding the announced rate as fixed and final as it had been during the previous year when no agreement had been in effect and the rate was set by Kinnelon as it had been since 1976-77. Board of Education at the City of Cape May, supra. Under these circumstances, Kinnelon could not claim additional amounts for 1983-84 by announcing a change in policy in November, subsequent to the commencement of that school year. Board of Education of the City of Burlington v. Board of Education of the Township of Edgewater Park, 1974 S.L.D. 672, aff'd by the State Board, 1976 S.L.D. 1074, aff'd by the Appellate Division, 1976 S.L.D. 1123.

For the reasons stated, we reverse the Commissioner's directive that the Board of Education of the Borough of Riverdale pay to the Board of Education of the Borough of Kinnelon additional amounts for tuition for 1983-84.

Attorney exceptions are noted.
January 6, 1988

Pending N.J. Superior Court

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BERNARD LAUFGAS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 2, 1987

For the Petitioner-Appellant, Bernard Laufgas, pro se

For the Respondent-Respondent, Gelzer, Kelaher, Shea, Novy & Carr (Kathleen W. Hofstetter, Esq., of Counsel)

Petitioner in this case alleged that the Barnegat Township Board of Education had expended or intended to expend public funds without authority to engage outside counsel to prosecute a motor vehicle complaint filed against him by one of its school bus drivers. He also alleged that the Board had expended or intended to expend public funds without authority to compensate witnesses who appeared at that hearing and to secure photographs to be used as evidence in those proceedings.

The Administrative Law Judge (ALJ) found that the Board had the authority both to retain outside counsel and to expend the public funds necessary to compensate those who gave their time and services to the Board in relationship to the municipal court proceedings resulting from the motor vehicle complaint. Therefore, concluding that there was no basis for granting the interim relief sought by Petitioner and finding that no other issue presenting a cause of action remained, the ALJ recommended dismissal of the Petition.

The Commissioner adopted the Administrative Law Judge's decision in the matter, and dismissed the petition.

On appeal, Petitioner argues that due process entitled him to a hearing in this matter. He further argues that since Title 18 does not explicitly authorize district boards of education to engage counsel to prosecute claims such as that involved here and because Title 40 authorizes employment of municipal prosecutors to handle special cases, the Board of Education of the Township of Barnegat did not have the authority to engage counsel in this case.

We conclude that Petitioner's arguments concerning deprivation of due process are without merit. As emphasized by the ALJ, the only questions raised by Petitioner's allegations concern whether the Board had the authority to take the actions he

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challenged. Those questions are purely questions of law. In such instance, Petitioner's rights to due process do not entitle him to an evidentiary hearing. See, e.g., Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

In resolving the legal questions raised by this appeal, we have carefully considered the arguments made by Petitioner in the support of his claim, and for the reasons expressed in the Initial Decision, conclude that the Board was legally entitled to act as it did. Accordingly, as found by the ALJ, there remains no claim upon which relief may be granted. We therefore conclude that dismissal of the petition in this case was proper.

February 3, 1988

Pending N.J. Superior Court

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BERNARD LAUFGAS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 30, 1987

For the Petitioner-Appellant, Bernard Laufgas, pro se

For the Respondent-Respondent, Gezler, Kelaher, Shea, Novy & Carr (Kathleen W. Hofstetter, Esq., of Counsel)

Based on our independent review of the record in this matter,[1] the State Board of Education affirms the decision of the Commissioner for the reasons expressed therein.

May 4, 1988

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[1] We note that the brief submitted by Appellant in essence waived legal argument.

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LINDA LEDWITZ,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 16, 1987

For the Petitioner-Appellant, Chamlin, Shotland, Rosen, Cavanaugh and Uliano (Thomas W. Cavanaugh, Esq., of Counsel)

For the Respondent-Respondent, Currafo, O'Connor, Dawes, Collins, Saker & Brown (Sanford D. Brown, Esq., of Counsel)

Petitioner in this case was employed by the Board as a special education teacher from 1979-80 until February 1986, when the Board terminated her employment on the grounds that she did not possess certification as a teacher of the handicapped. Petitioner challenged her termination, asserting that she had acquired tenure in the position.

The stipulated facts establish that despite Petitioner's representation on her employment application and accompanying resume that she was certified as a teacher of the handicapped, Petitioner was not certified as a teacher of the handicapped until March 1986, subsequent to her termination. Further, although eligible for such certification upon completion of the spring 1980 semester, she was not eligible upon her employment by the Board.

The Administrative Law Judge (ALJ), crediting Petitioner's testimony with regard to her belief that upon completion of the required courses for eligibility, the college she attended would have processed her application for issuance of the endorsement, and finding this belief reasonable, concluded that Petitioner had substantially met the conditions for tenure in that she was eligible for certification from spring 1980.

The Commissioner, concurring with the ALJ's conclusion that Petitioner's possession of K-8 certification had no bearing on the matter, rejected the ALJ's conclusion that Petitioner had acquired tenure based on her employment as a special education

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teacher. In rejecting that conclusion, the Commissioner emphasized that the record showed that Petitioner had misrepresented her possession and/or eligibility for certification as of May 1979, that she was not in fact eligible for the certification when she commenced employment with the Board, and that she persisted with her representation that she possessed certification when the administration discovered her certificate was not on file. The Commissioner found that the delay of the superintendent in verifying that Petitioner was properly certified did not absolve her of primary responsibility for applying for and possessing appropriate certification, and that, even assuming her belief concerning her college's role in the application process was reasonable, that belief did not excuse her from taking steps to acquire certification after a reasonable period of time. The Commissioner therefore concluded that the Board was within its legal rights to terminate Petitioner's employment for failure to possess appropriate certification in full force and effect and that in accordance with N.J.S.A. 18A:27-2, she was not entitled to an additional 60 days' pay that she sought.[1]

On appeal, Petitioner argues that, in assessing her conduct, the Commissioner departed from the ALJ's findings so as to require him to set aside those findings and specify new findings based on the record. She further argues that the Commissioner's conclusions are contrary to the evidence in that her representations concerning her certification do not rise to the level of knowing misrepresentation. Petitioner further asserts that in the absence of deliberate action to avoid certification requirements, tenure acquisition should be allowed here despite technical non-compliance.

We reject Petitioner's argument that the Commissioner's assessment of her conduct conflicts with either ALJ's findings of fact or the record in this matter. Rather, the Commissioner's decision reflects that he adopted the ALJ's findings and departed only in his assessment of the significance of those facts. There is no dispute that, as set forth in the stipulation, Respondent did represent that she possessed the required certification when she was initially employed by the Board and upon inquiry of her employer in February 1986. Thus, as recognized by the Commissioner, Petitioner misrepresented the fact that she did not possess certification regardless of whether such misrepresentation was deliberate or based on a mistaken belief. We find that the Commissioner's conclusion is consistent with the record and in no way implicates the credibility determination of the ALJ as to Petitioner's beliefs concerning certification.

Based on the record, we agree with the Commissioner that Petitioner had primary responsibility to apply for and possess appropriate certification during her employment and that, under the circumstances here, her failure to meet the precise requirements of

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[1] We note that this issue was not raised on appeal.

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N.J.S.A. 18A:28-5 can not be excused so as confer on her tenure status at the time of her termination. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). We therefore affirm the decision of the Commissioner of Education for the reasons expressed therein.

January 6, 1988

Pending N.J. Superior Court

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M.A.H., on Behalf of L.H.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
Board of Education of the Borough of Rutherford and Luke Sarsfield, Superintendent, Bergen County.	:	DECISION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, October 20, 1987

For the Petitioner-Appellant, Kathryn A. Brock, Esq.

For the Respondents-Respondents, Fogarty and Hara
(Rodney T. Hara, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

March 2, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF DR. RICHARD E.	:	
ONOREVOLE, SCHOOL DISTRICT	:	STATE BOARD OF EDUCATION
OF THE TOWNSHIP OF WEEHAWKEN,	:	DECISION
HUDSON COUNTY.	:	
	:	

Decided by the Commissioner of Education, January 22, 1987

Order by the Commissioner of Education, January 30, 1987

Remanded by the State Board of Education, August 5, 1987

Decision on remand by the Commissioner of Education, August 31, 1987

For the Petitioner-Appellant, Krieger, Ferrara, Flynn and Catalina (Joseph J. Ferrara, Esq., of Counsel)

For the Respondent-Respondent, Connolly, Vreeland, and Connolly (Joseph E. Connolly, Jr., Esq., of Counsel)

This case involves thirty-two tenure charges certified by the Board of Education of the Township of Weehawken against its superintendent Richard E. Onorevole. The individual charges alleged conduct asserted by the Board to be insubordinate and unbecoming a superintendent so as to warrant his dismissal. The specific charges included allegations of failures to attend functions and meetings, failure to cooperate with the Board in its review of personnel files, usurping the power of the Board, improperly acting without the Board's approval in several instances involving personnel and administrative matters, failures to properly notify the Board, failure to fulfill obligations pertaining to the budget, failure to develop curriculum as obligated by policy, failure and refusal to implement goals and objectives established in Respondent's evaluation, attempting to charge the Board for rental of personal equipment and expenses, ordering equipment so as to receive free gifts, establishing an arbitrary directive pertaining to delivery of letters, memorandum and purchase orders, negligence in recommendations pertaining to personnel matters in several instances, misinforming the Board, failure to adequately review and recommend as to personnel needs, arrogance, failure to recognize the Board's authority, and antagonism toward the Board.

Based on thirty-six days of hearing, at which some fifty witnesses testified, and 217 pieces of documentary evidence, as well as briefs submitted by the parties, the Administrative Law Judge

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(ALJ) rendered his Initial Decision in this matter. Recognizing in his decision that the case in large measure turned on the credibility of the testimony, the ALJ considered each of the charges individually, finding that, of the thirty-two charges, the Board had substantiated fully by a preponderance of credible evidence only charges 1, 2, 3, 15 and 20 and that, based on the evidence, charges 17 and 18 were partially true.

The ALJ, however, concluded that imposition of discipline based on the charges that had been substantiated was precluded, finding that Respondent had been held up by the Board to public ridicule, humiliation and embarrassment so as to have suffered sufficient indignity for his transgressions.

Based on his assessment of the credibility of the witnesses, and crediting testimony that Board member Atallo had stated in 1981 that he was going to get rid of Respondent, the ALJ ascertained that the relationship between Respondent and the Board had its genesis with Board member Atallo's election to the Board in March 1980. Based on the testimony, the ALJ questioned the propriety of the role taken by individual Board members. Emphasizing that it is not appropriate that individual Board members insert themselves into policy implementation, the ALJ recommended that the Superintendent and the Board initiate plans to include its administrative staff as participants in workshop meetings designed to correct the misperception in roles that he found evidenced in these proceedings.

The Commissioner adopted the ALJ's determinations concerning the validity of the charges. In so doing, the Commissioner relied on the standard applicable to judicial review of administrative proceedings. Accordingly, on August 5, 1987, the State Board of Education remanded the matter to the Commissioner for review of the ALJ's findings under the appropriate standard. We, however, made no judgment concerning the validity of the charges.

On remand, the Commissioner conducted an independent review of the entire record, giving due regard to the ALJ's observations and evaluation of the witnesses. Based on his review, the Commissioner concluded, as had the ALJ, that charges 1, 2, 3, 15 and 20 were true, and that charges 17 and 18 were partially true.

The Commissioner, like the ALJ, found that although Respondent's conduct, as demonstrated by the charges that had been substantiated, was less than commendable for a superintendent, no further penalty was warranted in light of the circumstances under which Respondent was compelled to conduct his duties. In so finding, the Commissioner concluded that this was a classic case of lack of communication and cooperation between the Board and Superintendent, with the Board engaging in a series of activities to circumvent the Superintendent's freedom of action and Respondent determining to resist in every way possible what he viewed as the Board's interference with the management of the district. The Commissioner encouraged the district to implement the ALJ's

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recommendation concerning workshop meetings to correct misperception of roles and additionally directed individual Board members to cease occupying the Superintendent's time with individual requests and directives as distinguished for communication from the Board as a whole. The Commissioner further directed Respondent's reinstatement with compensation for the 150 days' salary and benefits lost as a result of his suspension.

The Board has appealed, seeking Respondent's dismissal or, in the alternative, reduction in compensation. Respondent has cross-appealed, seeking dismissal of all charges. The Board has also filed a motion to strike Respondent's brief on the grounds that Respondent raises points in his brief not raised previously by way of exceptions filed with the Commissioner.

Initially, we deny the Board's motion to strike Respondent's brief. There is no requirement that a party file exceptions with the Commissioner in order to be entitled to appeal the determination of the Commissioner to the State Board of Education or to have his arguments considered on appeal.

We, like the Commissioner, have independently reviewed this matter. We note that, although both parties have included in their briefs extensive argument challenging the factual basis of the decisions below, such argument was not included as part of the legal arguments made by either party. We have nonetheless reviewed the transcripts and the decisions below with consideration of those sections of the briefs challenging the factual findings below. Based on our review of the record and after careful consideration of the arguments of the parties, we affirm the decision of the Commissioner, substantially for the reasons expressed therein.

In affirming the Commissioner's decision, we fully concur with his conclusions concerning the relationship between the Board and the Superintendent. The record here clearly shows that the Board has acted so as to circumvent freedom of action necessary if the Superintendent is to be able to properly administer the district. In turn, Respondent's conduct in response, as established in these proceedings, has been, as concluded by the Commissioner, less than commendable.

We remind both the Board and Respondent that their primary responsibility is the joint responsibility to insure that the school children of the Weehawken district receive the benefits of a thorough and efficient education. See Gibson v. Board of Education of the City of Newark, decided by the State Board, May 6, 1986, slip op. at 7 and 31-2, aff'd., Docket #A-5209-83T6 and A-3111-84T5 (App. Div. Oct. 15, 1986), slip op. at 3.[1] We cannot stress strongly

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[1] We recognize that the specific statutory scheme applicable to Newark is not applicable here. However, our statements of educational policy concerning the nature of the proper relationship between a board and its superintendent apply to every school district in this state.

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enough the importance of the establishment of a cooperative non-adversarial relationship between the Board and its Superintendent so as to enable them to fulfill this responsibility, and we emphasize that the responsibility to achieve such relationship rests equally with the Board and the Superintendent. See id. In the hopes that the Board and its Superintendent may achieve that relationship, we join with the Commissioner in encouraging implementation of the ALJ's recommendation that the Board and Superintendent initiate plans for workshops aimed at achieving correct perceptions of their respective roles.

February 3, 1988

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GARY N. PANAROTTO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND	:	
DONNA J. BECKER,	:	
INTERVENOR-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 8, 1986

For the Petitioner-Respondent, Bucceri and Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Parisi, Evers and Greenfield
(Irving C. Evers, Esq., of Counsel)

For the Intervenor-Appellant, Alfred F. Maurice, Esq.

This matter was initiated when, on June 21, 1984, Petitioner Gary N. Panarotto (hereinafter "Petitioner"), a tenured art teacher, filed a Petition of Appeal to the Commissioner, claiming that the Board's action in reducing his employment from full-time to 4/5 for 1984-85 while retaining less senior teachers was in violation of his tenure and seniority rights. Prior to hearing, at the request of the parties, the matter was placed on the inactive list.

On July 19, 1985, while Petitioner's claim concerning 1984-85 was still on the inactive list, Petitioner filed another petition, asserting that the Board acted improperly in terminating his employment for 1985-86 and subsequently assigning him to a 3/5 position for that year while retaining individuals who were less senior. On October 11, 1985, prehearing conference was held, at which time the matter was consolidated with the matter initiated by the earlier petition. At prehearing conference, the issues were specified to include whether the retention of Donna Becker, another tenured art teacher, on a part-time basis violated Petitioner's seniority rights.

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On November 19, 1985, Petitioner's current counsel, following a directive previously issued by the Administrative Law Judge (ALJ), notified Donna Becker of the pendency of Petitioner's action. On November 22, counsel for Donna Becker moved to intervene in the consolidated case and to file a cross-claim for affirmative relief. On January 6, 1986, by order of the ALJ, Donna Becker was granted permission to intervene and to file her cross-claim.

The ALJ issued a summary decision in the case based on stipulation of the parties. Emphasizing that there was no dispute that if the current seniority regulations were applicable to Petitioner, his claim must fail, the ALJ found that the question at issue was whether the current regulations were to be applied to the Board's reductions in force in 1984 and 1985[1]. Determining that both Petitioner and Intervenor had been affected by reductions prior to September 1983, the ALJ resolved this question by application of the Commissioner's decisions in Felper v. Board of Education of the Town of West Orange, decided by the Commissioner, January 28, 1985, and Cohen v. Board of Education of the Borough of Emerson, decided by the Commissioner, September 3, 1985, and concluded that the pre-amendment regulations controlled determination of the relative seniority of Petitioner and Intervenor. The ALJ found that, under those regulations, Petitioner had greater seniority than Intervenor.[2] Since Petitioner had greater seniority at the time of the first reduction in his employment in 1984, reduction of his employment from full-time was improper, and consequently further reduction in 1985 was also improper. The ALJ therefore determined that Petitioner should be returned to full-time employment.

The ALJ then considered Intervenor's claim to affirmative relief. She concluded that Intervenor's claim was time barred, reasoning that, although Intervenor had been reduced from full-time employment in 1981, she had not challenged that reduction and had suffered no further reduction since that time.

The Commissioner adopted the ALJ's determination that the Board had acted improperly in reducing Petitioner's employment, but,

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[1] There is no dispute that under the regulations in effect at the time of the Board's action in 1984, Petitioner had 4 years' seniority credit as an art teacher in the elementary category while Intervenor had 10.8 years' credit based on her service in that category. Stipulation of Facts; Exhibit A (Board's seniority list as of June 1984).

[2] Under the regulations in effect prior to September 1, 1983, although Petitioner had actually served as an art teacher in the elementary category for only 4 years, he would have been credited with 13.3 years seniority as of June 1984 based on his total service in the district as an art teacher at both elementary and secondary levels. In comparison, Intervenor would have 10.8 years' credit for her service, which was entirely as an elementary art teacher.

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finding that the question of the timeliness of Intervenor's claim was moot, passed no judgment on that issue.

Intervenor appealed, arguing that the current regulations are controlling in this case. She further argues that her claim to affirmative relief is not time-barred in that her cause of action arose with the Board's reductions in 1984 and 1985 and not with earlier reduction in 1980.[3] She asserts that the Board's reductions in 1984 and 1985 provided her with a cause of action in that, although her employment was not reduced, she was denied full-time employment as a consequence of the Board's actions. Finally, she contends that since neither Petitioner nor the Board notified her of the 1984 action commenced by Petitioner, she is not time-barred from relief for 1984-85.

In response, Petitioner argues that Intervenor's claim is time-barred in that the only reduction in employment Intervenor suffered was in 1981, which she did not challenge, and that the Board's actions of 1984 and 1985 did not harm her. Petitioner further contends that Intervenor's claim is barred since, in any event, she knew she was more senior under the current regulations by virtue of the Board's seniority list of June 1984, she further knew she was working part-time, and yet she asserted no claim. No brief was filed on behalf of the Board.

Again, it is undisputed that if the regulations now in effect properly controlled determination of the relative seniority of Petitioner and Intervenor at the time of the Board's reductions in force in 1984 and 1985, Intervenor was the more senior and, consequently, Petitioner's claim must fail. In Cohen v. Board of Education of the Borough of Emerson, decided by the State Board, June 3, 1987, appeal pending, Appellate Division, we reversed the Commissioner's decision in that case and overruled his decision in Felper v. Board of Education of the Town of West Orange, supra. In Cohen, we held that when a reduction in force occurs, seniority determinations as to all staff members are to be made under the regulations in effect at the time of the reduction regardless of whether any member had been affected by a prior reduction. See Elsa Hill v. Board of Education of the Town of West Orange, Docket #A-4355-84T1 (App. Div. Feb. 19, 1987). The reductions at issue here occurred in 1984 and 1985, subsequent to the effective date of the regulations now in effect. Therefore, in fulfilling the statutory mandate of N.J.S.A. 18A:28-10, the Board was required to determine the relative seniority of Intervenor and Petitioner under the regulations now in effect. As stated, under those regulations, Petitioner had less seniority in the applicable category than Intervenor and, thus, has no claim that reduction of his employment was improper.

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[3] We note that although the reduction in question occurred in 1980, Intervenor's employment was not reduced until 1981, when she returned from maternity leave.

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We now turn to the question of whether Intervenor's claim for affirmative relief is time-barred by N.J.A.C. 6:24-1.2. That regulation requires that petitions to the Commissioner be filed "... no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested... hearing". Intervenor's cross-claim was filed on November 22, 1985, more than 90 days after the Board's action in 1984, which gave rise to these proceedings. However, for the reasons that follow, we conclude that Intervenor is not barred from relief by N.J.A.C. 6:24-1.2.

Initially, we emphasize that the actions that Intervenor sought to challenge by her cross-claim were the Board's reductions of 1984 and 1985. Accordingly, her failure to challenge earlier reductions affecting her does not bar Intervenor's claim relating to the reductions at issue here, and we reject the ALJ's determination in that respect.

Furthermore, although the Board's seniority list was available in June 1984, that list constituted sufficient notice only as to any cause of action the basis for which was reasonably ascertainable on its face. Meyer v. Board of Education of the Township of Wayne, decided by the State Board, March 5, 1986, affirmed, Docket #A-3175-85T6, (App. Div. September 24, 1987). In that Intervenor's employment was not reduced as a consequence of the Board's actions in 1984 and 1985, we can not consider the Board's seniority list to constitute notice to Intervenor of the reductions she is challenging.

On the basis of the record, Intervenor's first notice of the reductions she challenges occured when Petitioner's current counsel notified her of the pendency of this action. Nor does the record indicate that Intervenor knew about the reductions prior to the commencement of the 1985-86 school year. Intervenor moved promptly following notification of the pendency of this case, see N.J.A.C. 1:1-16.4, both to participate and to file her cross-claim, see N.J.A.C. 1:1-16.1, and permission to do so was granted by the ALJ. See N.J.A.C. 1:1-16.6. We conclude that, under these circumstances, consideration of Intervenor's claim is not barred by N.J.A.C. 6:24-1.2.

Nor is Intervenor's claim barred because her employment was not reduced as a consequence of the Board's action. Intervenor claims that, under the regulations in effect at the time of the Board's actions, she was the most senior teacher in the category of elementary art and that, therefore, when the Board determined to reduce its force in 1984 and 1985, she was entitled to be retained on a full-time basis. By her claim, she challenges the propriety of the Board's actions taken pursuant to N.J.S.A. 18A:28-9, and, in the event the Board's reductions in force in 1984 and 1985 are not valid, she, as the most senior teacher in the applicable category, would be entitled to relief. N.J.S.A. 18A:28-10. See Bartz v. Burke v. Board of Education of the Township of Greenbrook, decided by the State Board, August 5, 1987.

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We turn now to the question of whether the Board's actions in 1984 and 1985 constituted proper exercise of the authority granted it by N.J.S.A. 18A:28-9. N.J.S.A. 18A:28-9 permits district Board's to reduce the number of its members whenever, for any one of the statutorilly permissible reasons, it judges that it is advisable to abolish any such positions. Thus, the determination to abolish a particular position must be supported by one of the reasons enumerated in the statute before the employment of any tenured individual may be affected. There is no dispute in this case concerning the validity of the Board's determination that it was necessary to reduce its elementary art program by the equivalent of 1/5 of a full-time position. However, the sole justification offered by the Board for reduction of the existing full-time position was its determination that Petitioner had less seniority than Intervenor.[4] We conclude that when a district board determines that reduction in an educational program is advisable, the relative seniority of the individuals who will be affected does not provide justification under N.J.S.A. 18A:28-9 for the reduction to part-time of an existing full-time position to which the most senior member would be entitled pursuant to N.J.S.A. 18A:28-10. See Bartz v. Burke v. Board of Education of the Township of Greenbrook, supra. To hold otherwise would obviate the rights granted by N.J.S.A. 18A:28-10, as well as undermine the measure of security conferred on tenured teaching staff members by N.J.S.A. 18A:28-5. See, e.g., Lingelbach v. Board of Education of the Borough of Hopatcong, Docket #A-4783-83T7 (App. Div. May 17, 1985), certif. denied, 101 N.J. 333 (1986); Vogel v. Board of Education of the Borough of Ridgefield, decided by the State Board, June 5, 1985. cf. Bednar v. Westwood Board of Education 221 N.J. Super. 239 (App. Div. 1987).

For the reasons stated, we conclude that the Board acted improperly in reducing the existing full-time position in 1984, and that, consequently, its further reduction of that position in 1985 likewise was improper. We find that the Board's reductions triggered Intervenor's seniority rights, e.g., Howley v. Bd. of Ed. of the Township of Ewing, 1982 S.L.D. 1328, aff'd, 1983 S.L.D. 1554, and that, as the most senior member as determined under the regulations in effect at the time of the reductions in force, Intervenor was entitled to employment on a full-time basis for 1984-85 and 1985-86.

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[4] We note that the factual circumstances here are somewhat unique in that, by operation of the previous regulations, Intervenor, as the less senior art teacher, was employed on a part-time basis in 1984, while Petitioner was employed in the full-time position. However, as of September 1, 1983, any seniority determination made under the regulations in effect as of that date results in determination that Intervenor was more senior. We further note that until a reduction in force occurred, Intervenor's seniority rights remained incohate. See, e.g., Howley v. Bd. of Ed. of the Township of Ewing, 1982 S.L.D. 1328, aff'd, 1983 S.L.D. 1554.

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We therefore reverse the Commissioner's decision in this matter and direct Intervenor's reinstatement to full-time employment with back pay and emoluments from the commencement of the 1984-85 school year.

Attorney exceptions are noted.

April 6, 1988

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BOARD OF EDUCATION OF THE CITY OF PATERSON,	:	
PETITIONER-RESPONDENT,	:	
AND	:	STATE BOARD OF EDUCATION
MELINDO PERSI, COUNTY SUPERINTENDENT,	:	DECISION
INTERVENOR,	:	
V.	:	
CITY COUNCIL OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, December 24, 1987

Decision on motion by the Commissioner of Education, February 18, 1988

Decision on motions by the State Board of Education, April 6, 1988

For the Petitioner-Respondent, Robert G. Rosenberg, Esq.

For the Respondent-Appellant, Ralph L. DeLuccia, Jr., Corporation Council, City of Paterson (Jessica G. deKoninck, Esq., of Counsel)

For the Intervenor, Marlene Zuberman, Deputy Attorney General (W. Cary Edwards, Attorney General)

This appeal calls upon the State Board of Education to pass on the propriety of reductions made by the City Council of Paterson (hereinafter "Council") to the current expense budget for 1987-88 proposed by the Board of Education (hereinafter "Board") following defeat of the budget by the voters.

The circumstances of this case are unique in that, as a consequence the Council's reduction of $5,700,000 in the amount to be raised by taxes, the Board's current expense budget was reduced to $112,753,975, the amount originally proposed by the Board to the County Superintendent on February 26, 1987, and rejected by him on his review pursuant to N.J.S.A. 18A:7A-28.

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Following rejection of its proposed budget by the County Superintendent, the Board, on March 23, 1987, adopted a revised budget in the amount of $118,453,975. This budget was approved by the County Superintendent and was submitted to the voters in the April 7 election.

The electorate, however, defeated the budget. Accordingly, as required by N.J.S.A. 18A:22-37, the budget was transmitted to the Council for its judgment as to the amount "...necessary to be appropriated, for each item appearing in [the] budget, to provide a thorough and efficient system of schools in the district...."

After meeting with representatives of the Board on April 22, 1987, the Council, by resolution of April 28, reduced the amount to be certified by $5,700,000, thereby approving a total budget of $112,753,975. C-1, in evidence. The Council's resolution, however, did not designate its reductions by codified line item.

The Board appealed to the Commissioner, who transmitted the matter to the Office of Administrative Law for hearing. At the prehearing conference, the Administrative Law Judge (ALJ) advised the parties that the Council would be allowed to clarify its resolution of April 28 by identification of codified line items and by providing greater specificity of educational rationale, but that it was required that its clarification remain consistent with its original resolution.

On August 4, 1987, the Council adopted a second resolution, incorporating some, but not all of the reductions it made on April 28. C-2, in evidence. However, although the total amount of reductions remained the same, and consequently the total budget amount remained $112,753,975, the Council's resolution of August 4 made reductions in accounts that had not been reduced by its resolution of April 28. Compare C-1, in evidence with C-2, in evidence.

In making his determination, the ALJ refused to consider any reductions not included in the Council's resolution of April 28. Following consideration of the reductions in the line items included in that resolution, the ALJ recommended restoration of $3,247,712. He, however, sustained reductions totalling $2,452,288, primarily on the basis of stipulations of the parties.

The Commissioner adopted that portion of the ALJ's determination recommending restoration of $3,247,712, noting that the ALJ had not refused to consider those specific line item reductions included in the August 4 resolution that were directly related to the reasons and overall series reductions delineated by the Council in its April 28 resolution.

The Commissioner, however, rejected that portion of the Initial Decision that recommended sustaining reductions in the amount of $2,452,288. With respect to this amount, the Commissioner expressed serious reservations about the Board's willingness to

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stipulate to its need to a budget amount that was less than that approved by the County Superintendent. In view of the District's Level III monitoring status, and citing the District's $1.9 million deficit revealed by certified audit on October 23, 1987, which was included in the record, C-7, in evidence, as well as the Board's failure to seek the testimony of the County Superintendent as to why he had rejected the Board's initial budget proposal of $112,753,975, the Commissioner remanded the matter for expedited proceedings with direction that the County Superintendent be made a party to those proceedings.

The Council appealed the Commissioner's decision in its entirety and sought a stay with respect to both the amounts directed to be restored and the remand. The County Superintendent moved to intervene in the appeal to the State Board. On April 6, 1988, the State Board of Education denied the Council's motion for stay and granted the County Superintendent status to intervene in this appeal so as to permit him to address all issues raised. Board of Education of the City of Paterson v. City Council of the City of Paterson, decision on motions by the State Board, April 6, 1988.

Although the Council's arguments on appeal pertain almost entirely to its challenge to the remand directed by the Commissioner, it has also challenged that portion of the Commissioner's decision adopting the ALJ's determination to limit consideration of reductions to those included in the Council's resolution to April 28 and, consequently, directing restoration of $3,247,712. With respect to this issue, the Council argues that the Board did not take the initiative to provide the Council with sufficient information so that the matter should be remanded for consideration of the additional budget cuts it made in its August 4 resolution.

Based on our review of the record, we affirm the Commissioner's determination to limit consideration of the Council's reductions to those included in the Council's resolution of April 28. As detailed in the decisions below, the Council's April resolution failed, as required by statute, to identify each line item that was subject to its reductions. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966). Nor did it provide reasons for its reductions that reflected that it had considered the impact of each reduction on the educational process. Id. See Board of Education of the Township of Irvington v. Mayor and Council of the Township of Irvington, decided by the Commissioner, October 30, 1987, aff'd by the State Board, April 6, 1988, appeal pending, App. Div.

In permitting the Council to clarify its resolution of April 28, the ALJ provided the Council with the opportunity to correct its deficiencies to the extent that its failure was one of a failure in the required degree of specificty or a failure to fully articulate its rationale. See Board of Educ. v. Deptford Tp., 225 N.J. Super. 76 (App. Div. 1988).

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The ALJ's directive, however, in no way provided authority to the Council to act anew by reducing items that may have escaped its attention when it acted originally, irrespective of whether or not the total amount reduced from the budget would remain the same by virtue of reallocation. We find that to permit such after the fact reduction in a budget certification would be contrary to N.J.S.A. 18A:22-37, and would permit a municipal body to avoid its statutory obligations in the first instance, to then effectuate an otherwise unsustainable budget reduction by reallocation and to make additional cuts in the budget.

Quite simply, the appeal made by the district Board pursuant to N.J.S.A. 18A:22-37 did not reopen the budget process so as to permit the Council to act anew by making reductions in line items not included when it acted on April 28. Furthermore, we find no merit to Council's arguments that it should be permitted to make reductions in accounts not originally reduced because it initially overlooked the possibility of reducing those accounts. The district Board, as it was required to do by statute, provided the Council with its budget, and representatives of the Board met with the Council to discuss the budget. We find nothing in the minutes of the meeting of April 22 to indicate that the School Business Administrator did not answer Council's questions to the best of his ability, and there is no indication in any responses of bad faith with respect to the Council. R-2, in evidence.[1] See Board of Educ. v. Deptford Tp., 225 N.J. Super. at 83. Nor do we find any merit to the Council's argument that responsibility for its failure to fulfill its statutory obligations was somehow shifted to the Board because the School Business Administrator's understanding of what was required from the Council was not correct.[2]

Therefore, for the reasons set forth above, as well as those expressed by the Commissioner in his decision, we affirm the Commissioner's determination directing restoration of $3,247,712 to the Board's current expense budget for 1987-88.

We turn now to the question of the propriety of that portion of the Commissioner's decision remanding for further hearing line item amounts totalling $2,452,288 and joining the County Superintendent as a party to those proceedings. For the reasons

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[1] Although the adequacy with which the Board represented its presumed interest in a budget that would permit the District to provide a thorough and efficient education is not implicated in this aspect of the Council's appeal, we note that the minutes reflect a degree of agreement with the Council's ultimate objective that is somewhat surprising under the circumstances. See, e.g., R-2, in evidence, at 9, 11-13, 21-22, 31-32, 33, 53 and 98.

[2] We note that Council did have the benefit of its own legal counsel and that, at its meeting with the Board, its Counsel did offer her opinion disputing the School Business Administrator's understanding of what was required. e.g., R-2, in evidence, at 43.

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that follow, as well as those expressed by the Commissioner, we affirm.

Like the Commissioner, the State Board of Education has consistently placed great emphasis on the requirements that a municipal body must identify the line items reduced and provide reasons for its reductions when it acts pursuant to N.J.S.A. 18A:22-37. e.g., Board of Education of the Township of Irvington, supra. We have also held that the reasons provided by the municipal body must be such as to indicate that it considered the impact of its reductions on the educational process when it acted. Id.

These guarantees against arbitrary action are in themselves of great importance. However, the ultimate significance of these protections, especially in view of the limited review function in this context, is to insure that a municipal body effects only those savings that do not impair the educational process so that the students are not deprived by the actions of the municipal body of their right to a thorough and efficient education. See Bd. of Ed., E. Brunswick v. Tp. Council, E. Brunswick, supra.

Simply, in this context, the overriding responsibility of the Commissioner and the State Board of Education is to assure that the mandate for a thorough and efficient system of free public schools may be carried out. Id. This responsibility is not obviated by the fact that in defeating a budget proposed by a district board, the voters of a particular district have indicated that they desire financial savings or that a district board might be willing to accept a budget amount less than that required to provide a thorough and efficient education.

Thus, in this case, as in any case of significant reduction by a municipal body, it was the responsibility of the Commissioner to ensure that the budget before him was sufficient to provide the students of the district with a thorough and efficient education. Given the fact that this district was uncertified throughout the period relevant to these proceedings,[3] and that it entered Level III monitoring status in July 1987, the Commissioner's determination that the stipulations of the district Board to amounts less than those approved by the County Superintendent could not be accepted without substantiation of the factual basis was entirely proper. Furthermore, we find that the Board's willingness to stipulate to lesser amounts called for the joinder of the County Superintendent in order to insure that the students of this district were not further deprived of their right to a thorough and efficient education. In this respect, we find that, both as the Commissioner's representative, N.J.S.A. 18A:4-22; N.J.S.A. 18A:7-1 et seq., and in view of his role in the monitoring process, see N.J.A.C. 6:8-4.1 et seq.; N.J.A.C. 6:8-5.1 et seq., the County

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[3] At the time the budget was struck, the District was in Level II monitoring.

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Superintendent is the proper party to assure that the right of the students in this district to a thorough and efficient education is adequately protected in this case.

Furthermore, we find no merit to the Council's objections to consideration of the audit report of October 1987, nor to its contention that the case should be dismissed on the basis of alleged "improper conduct" by the County Superintendent. The ALJ specifically held the record open for the purpose of receiving the audit report, and it is part of the record in this case. As to alleged "improper conduct" on the part of the County Superintendent, we could not on the basis of the record find that the County Superintendent in fact acted improperly, and we do not find that the allegations are such as to call for reversal of the Commissioner's determination that a remand is necessary in order to guarantee that the budget of this district is such that the students may be provided a thorough and efficient education.

Finally, we deny Council's request for oral argument. We reject its contention that such procedure is warranted because issues pertaining to the remand were not addressed at hearing in that the remand was directed by the Commissioner. In this regard, we emphasize that the parties have had full opportunity to address these issues in their briefs, and have done so. Nor do we find that oral argument is otherwise necessary in order to arrive at a fair determination in this case. N.J.A.C. 6:2-1.15(a).

Attorney exceptions are noted.
September 7, 1988

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JOHN POLAHA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, December 17, 1984

Decision on motion by the Commissioner of Education, April 10, 1985

Decision on motion by the State Board of Education, September 2, 1985

Decided by the State Board of Education, October 16, 1985

Remanded by the Appellate Division, October 7, 1986

Decision on remand by the Commissioner of Education, November 20, 1986

For the Petitioner-Respondent, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Capizola, Fineman and Kutner (Robert J. Pryor, Esq., of Counsel)

This case involves a Community Education Director (hereinafter "Petitioner"), who was employed by the Buena Regional School District (hereinafter "Board") with responsibility for the district's community enrichment education program, which was composed of non-credit courses. For the 1982-83 school year, Petitioner was also responsible for supervision of the district's adult high school, a credit program leading to a high school diploma. In March 1983, the Board resolved to abolish Petitioner's position although, in July, it approved continuation of both the community enrichment courses and the adult high school program by allocating responsibility for those programs to existing administrators and by the creation of a part-time position to provide logistical support for the community enrichment education program. On November 9, 1983, Petitioner filed a Petition of Appeal to the Commissioner, asserting that subsequent to abolishing his position, the Board had created two separate positions relating to its adult high school and community education program that included the duties he had previously performed so that he had seniority in the two positions.

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By decision of December 17, 1984, the Commissioner, rejecting the Administrative Law Judge's recommendation, found that Petitioner's position had not been abolished, but rather had been bifurcated and continued to exist on a full-time basis in violation of Petitioner's tenure rights. The Commissioner directed that Petitioner be reinstated to both community education and adult high school positions with back pay for the community education position from September 1983. Although concluding that Petitioner's claim to the adult high school position was not time-barred in that a statutory right was involved, the Commissioner found that, based on laches, Petitioner was entitled only to prospective relief for that portion of the position.

On October 16, 1985, the State Board found on appeal that although Petitioner's claim involved a right derived from statute, any and all relief was subject to the time limit specified by N.J.A.C. 6:24-1.2. Finding that Petitioner's negotiations with the Superintendent did not excuse his failure to comply with the regulation and that there was no indication of circumstances warranting relaxation of the rule, the State Board concluded that Petitioner's claim was time-barred.

On October 7, 1986, the Appellate Division affirmed the State Board's determination that N.J.A.C. 6:24-1.2 was applicable to Petitioner's claim notwithstanding the assertion of a statutory right to tenure. The court, however, reversed the State Board's determination that there was no indication of circumstances warranting relaxation of the rule and remanded the matter to the Commissioner.

On remand, the Commissioner found that Petitioner should not be penalized for his attempt to settle the matter through negotiations so that the 90 day limitation period established by N.J.A.C. 6:24-1.2 did not start until the latter part of October 1984, and hence Petitioner's petition was timely filed. Having determined that the petition was not time-barred, the Commissioner modified his earlier decision on the merits only to the extent that he directed that Petitioner receive back salary from September 1983 less mitigation for both the adult high school and community education positions.

In its appeal to the State Board, the district Board challenges the Commissioner's determination that Petitioner's claim is not time-barred, arguing that there were no negotiations between Petitioner and the Board subsequent to July 14, 1983; and, in any event, a teacher's election to negotiate is not cause to disregard the requirements of N.J.A.C. 6:24-1.2. As to the merits, the Board renews its contention that by its actions in reorganizing its adult education program, the position of Community Education Director was abolished and no longer exists. It argues that its assignment of responsibility for the supervision and management of its adult education programs to its Superintendent was a proper exercise of its statutory authority, and that there is no suggestion that the Superintendent could not fulfill those responsibilities competently. It further argues that the part-time position of

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Community Education Coordinator was created for the purpose of relieving the Superintendent of purely ministerial duties and that the duties associated with that position are not comparable to those previously performed by Petitioner. The Board maintains that since the position in which Petitioner served no longer exists, Petitioner's tenure rights have not been violated. It urges that in the event it is determined that Petitioner's rights have been violated in connection with the coordinator's position, the duties attached to that position warrant only the salary designated by the Board, and, finally, it seeks remand of the question of mitigation in the event Petitioner prevails in this matter.

We agree with the Board that where a cause of action has accrued under the education laws as the result of board action, an individual's attempts to negotiate with the board so as to alter its determination does not in itself toll the period of limitations established by N.J.A.C. 6:24-1.2. We emphasize that, as argued by the Board, it is well established that a teacher's decision to arbitrate a controversy does not toll the limitations period. e.g., Riley v. Hunterdon Central High School Bd. of Ed., 1973 N.J. Super, 109 (App. Div. 1980); Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 79 N.J. 311 (1979). We can find no basis to distinguish an election by an employee to pursue negotiations so as to conclude that such negotiations automatically toll the time limit established by the regulation.

Under the education laws, a cause of action accrues and the time period for filing commences when a petitioner has notice of a final action by a board that is the subject of a dispute. N.J.A.C. 6:24-1.2. Where a petitioner has had adequate notice, any negotiations are aimed at altering the final determination of the board upon which his cause of action is based. Although a petitioner may in some instances successfully negotiate so as to alter that determination, such attempts can not be viewed as compelling excusal from the procedural requirements that must be met in order to entitle him to adjudication of his legal rights. To hold otherwise would seriously undermine the purpose for which those requirements are imposed. We therefore reject the Commissioner's determination that because Petitioner here attempted to settle this matter through negotiations, the 90 day period did not commence until the latter part of October 1983, when those attempts proved unsuccessful.

We have, however, reviewed the circumstances surrounding Petitioner's claim with care and conclude that relaxation of the rule is called for here. N.J.A.C. 6:24-1.17. Although Petitioner was clearly notified concerning the abolishment of his position in April 1983, and was aware in July that a part-time position relating to the District's adult education program had been established, J-13, in evidence, J-14, in evidence, the record contains no indication that he was either notified or aware of the reallocation of responsibilities that is the subject of this dispute until October. J-15, in evidence; J-16, in evidence; J-17, in evidence. Given these circumstances, we conclude that, although Petitioner's cause accrued in July when the Board, by formal action, approved the

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allocation of responsibilities that is the subject of Petitioner's challenge, J-10, in evidence, the interests of justice are best served in this case by relaxation of the rule so as to permit resolution of the merits of Petitioner's claim.

After careful consideration of Petitioner's claim in light of the record, we conclude that by its actions, the Board in fact abolished the position of Community Education Director and that its assignment of responsibility for its adult education programs was not improper so that Petitioner has no claim to reinstatement. The record shows that, in August 1979, Petitioner was employed by the Board to fill the newly established position of Community Education Director. J-1, in evidence; J-20, in evidence. A principal's certificate was required for the position, J-20, in evidence, and a school administrator's certificate was issued to Petitioner subsequent to his employment by the Board. Tr. 8/2/84, at 41-43. The duties of the position of Community Education Director as set forth in the job description included: 1) scheduling classes and building uses for community education, 2) determining the needs of the community for classes, 3) serving as liaison between the community and the Board, 4) preparing the budget, 5) evaluating programs, 6) seeking funding and 7) supervising all after school and community education activities and building use. J-20, in evidence.[1]

Petitioner testified that from his employment in 1979 until 1982-83, he performed duties relating to the community enrichment education program, Tr. 8/2/84, at 11, which was composed of classes taught by individuals who had a hobby or interest to share. Id. at 16. Specifically, he testified that he performed a needs assessment, compiled a list of classes, made logistical arrangements, acted as liaison with the Board, sought funding and conducted an informal evaluation of the community education program. Id. at 10-11. From 300 to 750 people per year participated in the community enrichment education program, which was structured in 16 week sessions. Id. at 31-33. An average of 20 individuals were involved in teaching in the program. Id. at 16. Certification, however, was not required to teach community enrichment courses. Id.; Tr. 8/2/84, at 107. In addition to his responsibilities for the community enrichment program, during the summer of 1981, Petitioner organized a summer school program for 9th through 12th grade students who had failed the regular daytime program. Id. at 25.

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[1] We note that the position title of Community Education Director is not one that is recognized in the rules pertaining to certification. N.J.A.C. 6:11-3.6(a). Nor does the record include any indication that the procedures set forth in N.J.A.C. 6:11-3.6(b) were followed by the Board. We further note that the Board does not dispute that Petitioner achieved tenure as Community Education Director.

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In September 1982, an adult high school was formed. Tr. 8/2/84, at 17. In contrast to the community enrichment program, the adult high school program was composed of credit courses leading to a diploma. Tr. 8/2/84, at 62; 107. Its curriculum was mandated by the State Department of Education, id. at 12 and 57, and teachers were required to possess certification. For 1982-83, approximately 30 individuals participated in the adult high school. Tr. 8/2/84, at 84. Although Petitioner's job description was not altered, he was assigned responsibility for supervising the adult high school for 1982-83, and, during that year, spent approximately 60% of his time performing duties relating to the adult high school. Tr. 8/2/84, at 12.

In January 1983, the Superintendent advised Petitioner that he was recommending elimination of the position of Community Education Director. J-1, in evidence. By memo of February 17, he advised Petitioner that the budget for 1983-84 provided for a different approach to community education so that the role of supervisor would be on an adjunct basis. J-2, in evidence.

The Superintendent testified that he considered enrollment declines in the elementary school, cut-backs in state and federal funding and state mandates for additional education programs in light of educational goals, and concluded, as he had recommended previously, that abolishment of the position of Community Education Director was advisable and that realignment of his administrative responsibilities was necessary. Tr. 8/2/84, at 105-106. He therefore recommended a new approach to the responsibilities for supervision so as to continue both the adult high school and the community enrichment courses, but to abolish the position of Community Education Director. Tr. 8/2/84, at 105-106.

On March 8, 1983, the Board resolved to abolish the position of Community Education Director. J-4, in evidence. On July 12, the Board approved allocation of the responsibilities for adult education as follows: part-time community education, adult evening school under an administrator's license, and a counselor or broker to be there in the evening. J-10, in evidence. On July 14, vacancies were announced for a part-time Community Education Coordinator[2] and a part-time counselor. J-11, in evidence. The job description for the coordinator's position specified that the responsibilities included coordinating the community education program excluding the adult high school plus preparation of necessary reports. J-12, in evidence. A teacher's certificate was required for qualification. Id.

The Superintendent testified that, under the approach taken by the Board, the Superintendent was to be responsible for the adult

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[2] We note that the position of Community Education Coordinator is not one recognized in the rules pertaining to certification. See supra note 1.

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high school, Tr. 8/2/84 at 107, but since the community enrichment courses did not require certification, logistical duties relating to that program would be performed by the part-time coordinator. Id. at 107-08. For 1983-84, the Superintendent supervised the adult high school, which was attended by approximately 63 students, Tr. 8/2/84, at 47, initiating recommendations, supervising the teachers, overseeing completion of forms, observing classrooms, and recommending teachers for employment. Id. at 54-58. In performing these duties, the Superintendent was assisted, as was Petitioner during 1982-83, by a counselor broker, who, as he had in 1982-83, received an hourly stipend. Tr. 8/2/84, at 59-60.

The Superintendent testified that although his responsibilities had not decreased, Tr. 8/2/84 at 52-53, but increased as a result of monitoring, as well as assumption of responsibilities relating to the adult high school program, id. at 70, he had felt that he would be able to absorb the responsibilities for the adult high school. Tr. 8/2/84, at 112. He further testified that in absorbing those responsibilities, he was performing the same functions that Petitioner had performed during 1982-83. Id. at 68. The Superintendent however did not receive any additional compensation as a result of performing these functions. Id. at 59-60.

During 1983-84, other functions relating to the adult education programs were likewise performed by existing staff. Lack of applicants for the part-time coordinator's position led to administrative assignment of one of the District's principals to fulfill temporarily logistical responsibilities for the community education program. J-18, in evidence; J-19, in evidence; Tr. 8/2/84 at 61 and 110. That individual received a stipend at the hourly rate advertised. Id. at 78-79. Responsibility for coordination of facilities was assigned without additional compensation to each building principal, Tr. 8/2/84, at 69, and a secretary assisted the Superintendent on a part-time basis. Id. at 118. The secretary also assisted in getting out brochures, receiving additional compensation for assisting in that task. Id. at 119.

We, like the Administrative Law Judge (ALJ), conclude that Petitioner has not shown that as a result of the Board's allocation of duties relating to the adult high school, his seniority rights were violated. We also concur with the ALJ's conclusion that, since the only new position created by the Board as a consequence of its allocation of duties relating to community education enrichment courses was that of a part-time coordinator, this is the only position that Petitioner could claim by virtue of seniority. We, however, conclude that Petitioner has no claim to employment in that position based on seniority since, not only are the position titles different, but the duties attending the coordinator position are not comparable with the responsibilities assigned to Petitioner as Community Education Director. N.J.A.C. 6:3-1.10(g).[3]

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[3] See supra note 1 and note 2.

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As set forth above, the record shows that the coordinator's role, aside from filling out reports, was entirely a logistical role. Tr. 8/2/84, at 61, 108 and 110. In contrast, the job description for Community Education Director, as well as the testimony in this case, shows that, although Petitioner performed some logistical functions, central to his position was substantive responsibility for the community enrichment education program. The fact that the coordinator's position provided for some of the logistical functions Petitioner may have performed does not lead to the conclusion that by establishing a coordinator's position, the Board continued on a part-time basis the position of Community Education Director so as to entitle Petitioner to the position on the basis of seniority.

The conclusion that Petitioner's seniority as Community Education Director does not entitle him to the position of coordinator is supported further by the fact that a teaching certificate was required by the Board for the coordinator's position, while a principal's certificate was required for the Community Education Director's position; and we emphasize that, as set forth above, performance of the duties attending the coordinator's position were not of such nature as to require certification as a principal. The hourly rate advertised for the coordinator's position, at which the principal temporarily assigned that role was compensated, is consistent with and further reflects the limited nature of the duties of the coordinator. We therefore conclude that Petitioner had no entitlement to employment in the position of coordinator on the basis of seniority acquired as Community Education Director, and that in offering the coordinator's position to Petitioner at the advertised rate of compensation, the Board fulfilled any obligation it may have had to consider him for the position.

We further conclude that the Board's actions in allocating responsibilities for the Board's adult high school and community enrichment program were not in violation of Petitioner's tenure rights. Although Petitioner's claim in this matter was based on alleged violation of his seniority rights, as recognized by the Commissioner, in claiming that the Board had continued his position by dividing it into two newly created positions, Petitioner was essentially claiming that his position had not been abolished. Based on our review of the facts of this case and the relevant law, we reject the Commissioner's conclusion that the position of Community Education Director continued to exist on a full-time basis in violation of Petitioner's tenure rights following abolishment of the position by the Board.

We emphasize that, in asserting his claim, Petitioner did not challenge the validity of the underlying reasons upon which the Board based its determination to abolish the position. The question before us rather is limited to whether, by its actions, the Board in fact abolished the position at issue.

Although boards of education have great discretion when acting pursuant to N.J.S.A. 18A:28-9, that discretion is not without

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limits. Tenure rights consistently have been accorded vigorous protection. Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215, 219 (App. Div. 1949); Catano v. Woodbridge Bd. of Ed., 1971 S.L.D. 448, 459-9. Because reductions in force often necessarily implicate tenure rights, the decision making process and its consequences are closely scrutinized whenever an allegation is made that tenure rights have been impermissibly compromised by board action taken pursuant to N.J.S.A. 18A:28-9. Vogel v. Board of Education of the Borough of Ridgefield, decided by the State Board, June 5, 1985. Further, it is settled that abridgment of tenure rights is not countenanced if it is found that the duties of the position abolished under the authority granted by N.J.S.A. 18A:28-9 have in fact been transferred to another position so as to defeat the tenure rights of an employee who is tenured in the abolished position. Viemeister, supra. In such case, the substance of the board's actions rather than the form controls. Id. at 218.

As set forth above, following abolishment of the position of Community Education Director, the administrative and supervisory responsibilities attending that position were assumed by the Superintendent, and logistical and support functions allocated among existing staff positions and a part-time coordinator. Thus, although the Board continued to offer both the adult high school program and community enrichment courses for 1983-84, this is not a case where a tenured teaching staff member is terminated and replaced by a non-tenured individual performing the same duties, without change, as existed prior to the reorganization. See Lingelbach v. Board of Education of the Borough of Hopatcong, Docket #A-4783-83T7 (App. Div. May 17, 1985) certif. denied, 101 N.J. 333 (1986). Nor is it a case where the duties of a position were transferred in total to another staff member, along with the compensation attached to the position that previously existed, Sampietro v. Board of Education of the Township of Ridgefield Park, decided by the State Board November 5, 1986, or a case where performance of the duties allocated imposed distinct certification requirements so as to require the establishment or maintenance of a distinct position. Id.

Again, in abolishing the position of Community Education Director, the Board acted under the authority conferred on it by N.J.S.A. 18A:28-9. That statute permits a district board to reduce the number of teaching staff members it employs whenever it judges that it is advisable to abolish any such positions for reasons of economy, or reduction in the number of pupils, or change in the administrative or supervisory organization of the district, or any other good cause. Sampietro, supra. In this case, the Board's determination to abolish the position of Community Education Director was based on budgetary constraints resulting from declining enrollment at the elementary level, cut-backs in state and federal funding and increased demands relating to mandated educational programs. As stated, the validity of those reasons was not challenged by Petitioner when he asserted his claim. However, in assessing the propriety of the Board's action, we emphasize that the record shows that the allocation of responsibilities following abolishment of the position here was based, as was the decision to

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abolish the position, on the educational rationale that, in light of constraints, the District's educational objectives best could be met; and, at the same time, its adult education programs continued if the Superintendent assumed administrative and supervisory responsibility and the logistical and support functions were allocated as previously described. See Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982).

We find nothing in either N.J.S.A. 18A:28-9 or in the protection afforded by N.J.S.A. 18A:28-5 to require that when a Board determines to abolish an administrative position responsible for supervising an educational program, it must discontinue the program as well. Rather, a board may in good faith eliminate an administrative position and assign the duties of that position to an administrative staff member serving in another position title within the scope of which the additional duties may be performed so as to continue the program. Blumstein and Onorevole v. Board of Education of the Township of Weehawken, decided by the State Board, August 7, 1985, affirmed Docket #A-309-85T1 (App. Div. Nov. 12, 1986), reconsideration denied by the Appellate Division, Dec. 11, 1986, determination to decline to alter its decision by the State Board, June 3, 1987. We find that in allocating the administrative and supervisory responsibilities at issue here to the Superintendent, the Board acted within its statutory authority. Id.

In concluding that the Board did not act improperly in assigning responsibility for the adult high school to its Superintendent, we reject the Commissioner's determination that such assignment was inappropriate in this case. As we held in Blumstein, supra, a district board may properly assign such responsibilities to its superintendent pursuant to N.J.S.A. 18A:17-20. Nor do we find that such assignment is precluded by N.J.A.C. 6:27-1.6. That regulation, which establishes one of the criteria for approval of secondary schools, provides that when high school enrollment does not exceed 300 pupils, the district's superintendent may also serve as high school principal so long as he does no teaching and provided that at least one half of his time is given to administration and supervision of the high school. N.J.A.C. 6:27-1.14 requires that the rules for approval of high schools shall apply in general to evening high schools. However, as we recognized in Blumstein, although the term "school" is nowhere specifically defined, it is apparent from the context of the regulatory provisions that the term "school" refers to a facility rather than a particular program of instruction. Accordingly, the fact that assignment of responsibility for the adult high school to the Superintendent precluded meeting this criteria does not invalidate the assignment.

We again emphasize that in this instance, as reflected in the Superintendent's testimony, the assignment of responsibility was based on an educational rationale that, in light of constraints, the course of action chosen by the Board would permit the District to meet what it judged to be its primary educational objectives without eliminating the programs at issue here. Given the number of students who participated in the District's adult high school program in 1982-83 and 1983-84, and the Superintendent's testimony

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concerning his performance of his duties, both generally and in relationship to the adult high school, we find no basis for concluding that the Superintendent in this case failed to effectively carry out his responsibilities notwithstanding that his responsibilities increased.

In sum, we conclude that Petitioner has failed to establish entitlement to reemployment as Community Education Director or as Community Education Coordinator by virtue of his seniority. We further conclude that, in abolishing the position of Community Education Director and in redistributing the duties encompassed in that position to existing administrators and a part-time coordinator, the Board acted properly within the authority conferred on it by N.J.S.A. 18A:28-9, and that, in so doing, the Board in fact abolished the position of Community Education Director. We therefore reverse the decision of the Commissioner in this case.

Attorney exceptions are noted.

Regan Kenyon opposed.

March 2, 1988

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IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD ROEMMELT,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	STATE BOARD OF EDUCATION
OF WASHINGTON, WARREN COUNTY.	:	DECISION
	:	

Decided by the Commissioner of Education, April 15, 1987

For the Petitioner/Cross-Appellant, Robert L. Schumann, Esq.

For the Respondent-Appellant, Klausner, Hunter and Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

Respondent-Appellant, Ronald Roemmelt, hereinafter "Respondent," a tenured 5th grade teacher, was charged by the Board of Education of the Borough of Washington with unbecoming conduct. Specifically, the Board certified seven charges based on several incidents occurring in spring 1986, involving the alleged use of improper physical force.

Three of the charges, charges 1, 2 and 3, were based on an incident that occurred in May, when Respondent brought a baby rabbit to his homeroom and put it on a table in a box with a tensor-type lamp extended over the box. The Administrative Law Judge (ALJ) found that, although Respondent had earlier cautioned his students about putting their hands on the table, which was not steady, one student placed his fingertips on the table and leaned toward the box to look at the rabbit later in the day. At that point, without oral warning, Respondent pushed the student away from the table, struck the student on the back or shoulder with his open hand, grabbed him around the head, and pulled him 15 to 20 feet. Although the student did not suffer bruises, red marks were observed by two other students, and the student was upset and cried. The ALJ, crediting the testimony of the three student witnesses, found that the actions taken by Respondent were inappropriate under the circumstances, and that the force he used was excessive.

Charge 5 alleged that Respondent had pushed a student's desk into the boy's side in April 1986. Resolving certain inconsistencies in the testimony of the two student witnesses, the ALJ found that Respondent, without provocation or explanation, kicked the student's desk, causing it to move a short distance and into the rib cage of the student. The ALJ further found that the student did not suffer any pain.

The ALJ also sustained charge 7, finding that Respondent, without provocation, grabbed a pencil sharpener from the hand of a female student, throwing it forcefully to the ground and causing it to break. The ALJ, however, dismissed Charge 6, which alleged that

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Respondent had placed a student in a headlock, finding that the testimony did not support a conclusion of unbecoming conduct.[1]

The ALJ concluded that although Respondent's conduct was unbecoming a teacher, dismissal was not warranted in this case. He recommended instead a penalty of 120 days' loss of pay, loss of increments for 1986-87 and forfeiture of 20% of Respondent's salary for 1986-87.

The Commissioner first adopted the ALJ's determinations of the procedural issues raised by Respondent, concluding that the Board had before it sufficient evidence upon which to predicate the certification of the charges and that collateral estoppel did not bar consideration of charges 1, 2 and 3. The Commissioner then adopted the ALJ's findings concerning the substantive charges, and agreed that dismissal was not the proper penalty to be imposed. In light of the circumstances presented, the Commissioner however modified the penalty to loss of 120 days' pay and loss of increments for 1986-877.

On appeal to the State Board of Education, Respondent challenges the factual findings of the ALJ, arguing that the Board has not met its burden of persuasion in that the incidents alleged either did not occur or that the perceptions of the student witnesses were wrong. Respondent further renews his arguments that the charges must be dismissed because the statement of evidence was not accompanied by an affidavit based on personal knowledge. He also renews his arguments that, based on the criminal proceedings against Respondent, collateral estoppel bars consideration of charges 1,2 and 3. The Board has cross-appealed, seeking Respondent's dismissal from his position.

We reject Respondent's contentions that the ALJ's factual findings are not correct. Although the Commissioner was not provided with a transcript of the administrative proceedings, we have the benefit of those transcripts and have carefully reviewed them, as well as the transcript of the criminal proceedings against Respondent. We find that the transcripts support the ALJ's findings and, based on our review, In the Matter of the Tenure Hearing of Patrick Caporasa, Docket #A-4558-85TG (App. Div. March 19, 1987); Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (App. Div. 1962), we concur with the ALJ's resolution of inconsistencies in the testimony of the witnesses. In this regard, we emphasize that the ALJ was in a position to observe the student witnesses, Quinlan v. Board of Education of North Bergen Township, supra, and we find that his decision reflects careful assessment of their credibility. See Initial Decision, at 16, 17 and 18.

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[1] Charge 4, which alleged that Respondent had pressed his hands into the neck of a female student, was withdrawn by the Board.

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We also reject Respondent's argument that the statement of evidence upon which certification of the charges was based was insufficient so as to warrant dismissal of the charges. The purposes of N.J.S.A. 18A:6-11 are to "...adequately inform the board and the employee of the charges so that the employee can attempt to meet them and the board to weigh them, and to help assure that the charges are not based on frivolous, baseless or irresponsible allegations." In the Matter of the Tenure Hearing of Charles Apkarian, Docket #A-927-86T8 (App. Div. November 20, 1987), slip op. at 4. Thus, the test of the propriety of the statement of evidence "is not whether the evidence will be admissible at the hearing on the merits, but whether it satisfies the purposes of the statute." Id. In this case, the principal's affidavits included information obtained in interviews with students and unsworn statements by students and parents. We find that the principal's statement providing this information to both Respondent and the Board fully satisfied the purposes of N.J.S.A. 18A:6-11.

We further conclude that collateral estoppel is not applicable here so as to bar consideration of charges 1, 2 and 3. As emphasized by both the ALJ and the Commissioner, the quantum of proof required in a criminal action is both different and higher than that required in administrative proceedings, so that dismissal of the criminal charges against Respondent did not automatically bar consideration of the charges at issue. Sabia v. City of Elizabeth, 132 N.J. Super. 6 (App. Div. 1974); In re Darcy, 114 N.J. Super, 454 (App. Div. 1971).

Dismissal of the criminal assault charges against Respondent was predicated on the judge's conclusion that the prosecution had not shown that Respondent's actions had caused a physical injury as defined by N.J.S.A. 2C:11-1(a), thereby failing to prove an essential element of the criminal charge. Tr. 6/18/86, at 144-46. That dismissal therefore does not support a conclusion that there was a "finding" of justification so as to warrant the application of collateral estoppel in these proceedings. Nor does the transcript support a conclusion that there was such a "finding,"[2] or that the question was "fully and fairly" litigated so as to make the application of the doctrine of collateral estoppel appropriate here.[3] See City of Hackensack v. Winner, 82 N.J. 1

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[2] We note that the municipal court judge prefaced his remarks concerning whether Respondent's actions were justifiable with the comment that, because he had rendered his opinion on the basis of the prosecution's failure to meet its burden, hearing the defense's testimony was "probably without any value...." Tr. 6/18/86, at 146.

[3] In view of our conclusion, it is unnecessary for us to consider whether a finding of justification under the criminal law represents a finding of justification under the education law.

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(1980). c.f. In the Matter of the Application of the Licensure of Andrian, Docket #A-1058-84T7 (App. Div. July 10, 1986).

As set forth above, based on our review of the record, including the transcripts, we adopt the ALJ's findings concerning the substantive charges. As concluded by both the ALJ and the Commissioner, we find that Respondent's conduct constitutes conduct unbecoming a teacher notwithstanding that Respondent did not intend to inflict harm. e.g., In the Matter of the Tenure Hearing of Robert Doyle, decided by the State Board, June 4, 1986, aff'd in part and remanded, Docket #A-4885-85T6 (App. Div. Nov. 11, 1986), clarification of penalty by the State Board, January 1, 1987, aff'd, Docket #A-4885-85T6 (App. Div. June 3, 1987), certif. denied, 109 N.J. 55 (1987). However, after careful consideration of the circumstances, including the nature and gravity of the Respondent's offenses, and taking into account Respondent's sixteen years of service and the fact that he has not been the subject of prior disciplinary action, we concur with the ALJ and Commissioner that dismissal is not warranted in this case. In re Fulcomer, 93 N.J.Super, 404, 421-22 (App. Div. 1967). We find that given the circumstances here and the seriousness with which we view Respondent's failure to exercise the restraint and self-control expected of a teacher, In the Matter of the Tenure Hearing of Doyle, supra, the penalty of loss of 120 days' salary and increments for 1986-87 imposed by the Commissioner is the appropriate penalty in this case.

Maud Dahme, Anne Dillman and John Klagholz opposed.
February 3, 1988

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John Klagholz dissenting. Anne Dillman joining in the dissent.

Although I concur with the majority that Respondent's conduct as established in these proceedings constitutes conduct unbecoming a teacher, I strongly disagree with the majority's conclusion that dismissal is not warranted in this case.

I am mindful of the conclusions we reached in Doyle. However, I find the circumstances here to be very different from those in Doyle, and find Respondent's conduct in this case to be inexcusable. In my view, slapping a student and pulling him the distance involved here is not acceptable under any circumstances. The gross lack of self control demonstrated by Respondent in his aggressive behavior toward a fifth grade student violates the rights of students to be free of offensive touching and the trust placed in him by parents. I therefore conclude that dismissal is the proper penalty.

Maud Dahme dissenting.

While I agree that dismissal is warranted here, I do not believe that the nature of the conduct involved in Doyle was any less serious.

February 3, 1988

Pending N.J. Superior Court

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SHIRLEY VANDERHOOF,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 15, 1987

For the Petitioner-Appellant, Klausner, Hunter and Oxfeld (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Casper P. Boehm, Jr., Esq.

This case involves a challenge by a tenured teacher to her reassignment from assignment as a music teacher to that of in-school suspension teacher upon her return from medical leave of absence.

Emphasizing that Petitioner's seniority rights were not implicated by the reassignment in that no reduction in staff had occurred, the Administrative Law Judge (ALJ) concluded that, although Petitioner suffered no reduction in salary, the position of in-school suspension teacher was not comparable to the position of teacher. He therefore recommended that the Board be directed to assign Petitioner as a "teacher" and to credit her service as in-school suspension teacher to the category of teacher of music for seniority purposes.

The Commissioner rejected the ALJ's recommendation, finding that the County Superintendent's approval of the unrecognized position title of in-school suspension teacher and his determination that an instructional certificate was required for qualification was dispositive as to whether the position was that of a teaching staff member within the meaning of N.J.S.A. 18A:1-1. In that the position was not that of a substitute, the Commissioner found that it was a tenure eligible position under Spiewak v. Rutherford, 90 N.J. 63 (1982). As such, the position of in-school suspension teacher was equal to other teacher positions, and not one of lesser expectancy. Having concluded that the standards established in Bigart v. Bd. of Ed. of Paramus, 1979 S.L.D. 123, had not been violated, and in that regard specifically finding that the record contained no evidence of bad faith motivation by the Board in reassigning Petitioner, the Commissioner dismissed the petition in this matter.

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On appeal, Petitioner argues that her assignment as in-school suspension teacher constituted an improper transfer to a position of lesser expectancy and that, because the County Superintendent approved use of the position title before the Board adopted the job description, the County Superintendent's determination is a nullity. Notwithstanding the County Superintendent's determination that the position required instructional certification, Petitioner contends that the job description requires no teaching skills or knowledge, and, finally, that the Board's action was in bad faith because a relative of a Board member was retained as a music teacher from December through June 1986.

We find Petitioner's claims to be without merit. As emphasized by the Commissioner, the authority to determine what certification, if any, is required for service in an unrecognized position title is vested in the County Superintendent. N.J.A.C. 6:11-3.6. In this case, the County Superintendent determined that instructional certification was required, and, like the Commissioner, we do not find the procedural defect in this case to be such as to call into question the County Superintendent's determination in that regard. Because that determination specified instructional certification, the Board's action, contrary to Petitioner's arguments, did not constitute a transfer from a tenurable position, but rather a reassignment within the tenurable position of teacher. See Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986, Slip Op. at 9-10, aff'd Docket #A-943-86T7 (App. Div. July 2, 1987), certif. denied, 109 N.J. 514 (1987).

Thus, Petitioner's rights in this context, as concluded by the Commissioner, were controlled under the standards established in Bigart, supra. We fully concur with the Commissioner that Petitioner has not shown that the Board violated those standards in reassigning her. The fact that a Board member's son was retained for the remainder of the year in an assignment from which another tenured teacher was on leave is not sufficient to demonstrate that Petitioner's reassignment was in bad faith, especially in light of the fact that the individual assigned to Petitioner's position was one that she had recommended. Tr. 1/5/87, at 16-17.

We therefore affirm the Commissioner's decision in this matter. In affirming that decision, we emphasize that, as a tenured teacher, Petitioner's service in the assignment of in-school suspension teacher is to be credited for seniority purposes to all categories in which she had served prior to her reassignment, as well as to the category defined by the position title approved by the County Superintendent. N.J.A.C. 6:3-1.10(h).

June 1, 1988

Pending N.J. Superior Court

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EUGENE J. WILLIAMS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Remanded by the Commissioner of Education, May 1, 1987

Decided by the Commissioner of Education, November 30, 1987

For the Petitioner-Respondent, Oxfeld, Cohen, Blunda, Friedman, Levine and Brooks (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Pisano, Simon & Edelstein (Nathanya G. Simon, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 1, 1988

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BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MUNICIPAL COUNCIL OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 11, 1987

For the Petitioner-Respondent, Palmisano & Goodman (Carl J. Palmisano, Esq., of Counsel)

For the Respondent-Appellant, Joseph R. Bulman, Esq.

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In affirming that decision, we find that oral argument is not necessary in order to make a fair determination of this case, and therefore we deny Appellant's request for oral argument. N.J.A.C. 6:2-1.15.

February 3, 1988

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